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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 443

UNITED STEELWORKERS OF AMERICA,
PETITIONER,

vs.

WARRIOR & GULF NAVIGATION COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 30, 1959
CERTIORARI GRANTED DECEMBER 7, 1959

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA

Style of Cause

Civil Action No. 2100

UNITED STEELWORKERS OF AMERICA, AFL-CIO, an unincorporated association,

versus

WARRIOR & GULF NAVIGATION COMPANY, a corporation.

COMPLAINT—Filed October 16, 1958

I.

Plaintiff, a labor union, is an unincorporated association whose duly authorized agents are engaged in representing, in the Southern District of Alabama, employees who are and have been employees of defendant in an industry affecting commerce within the meaning of the Labor [fol. 2] Management Relations Act of 1947. Defendant is a corporation doing business in and having its principal place of business in Chickasaw, Mobile County, Alabama, within this District. Defendant has annually purchased large amounts of raw materials from and shipped large amounts of finished products to points outside the State of Alabama. This is a suit based upon violation of and seeking performance of a contract between a labor organization representing employees in an industry affecting interstate commerce as defined in said Act, as more fully hereinafter appears, and arises under said Act regulating commerce. (29 U.S.C. Section 185; 28 U.S.C. Section 1337.)

II.

On or about September 25, 1956, defendant executed a contract with plaintiff in writing. This contract covered and was executed by plaintiff as collective bargaining representative for certain employees of defen-

dant at its Chickasaw, Alabama, terminal, including the maintenance employees. A copy of said contract is attached hereto as Exhibit "A".

III.

In accordance with the provisions of said contract, a grievance was filed on, to-wit, August 22, 1958, by plaintiff and a large group of then-working and laid-off maintenance employees alleging that defendant was contracting out maintenance work covered by the aforementioned agreement to firms who were not covered by the aforementioned agreement. Plaintiff and defendant were unable to settle said grievance in the first four (4) steps of the procedure [fol. 3] set out in Section 10(A) of the aforementioned contract. Plaintiff has duly requested defendant to arbitrate said grievance pursuant to the provisions of Section 10(A)(Fifth) of the aforementioned agreement, but defendant has failed and refused to arbitrate said grievance as required by Section 10(A)(Fifth) of said contract.

IV.

Plaintiff further alleges that some maintenance employees of defendant covered by the aforesaid contract are laid off due to alleged lack of work; that some of those employees would not be laid off unless defendant were contracting out work which is included in the collective bargaining contract between plaintiff and defendant; and that the aforementioned employees on lay-off status will eventually lose their seniority rights and status as employees of defendant under Section 9, Clause (d) of the aforementioned agreement unless the aforementioned grievance is arbitrated.

V.

Plaintiff alleges that as a result of the above-described omissions and breaches of contract on the part of defendant, plaintiff and the maintenance employees whom it represents have suffered substantial and irreparable injury; and that plaintiff and, particularly, the employees

whose seniority rights are jeopardized by the contracting-out of work are without adequate remedy at law and will suffer immediate, continuing and irreparable injury, loss and damage unless the defendant is ordered specifically to perform the aforementioned contract and, in particular, [fol. 4] Section 10(A)(Fifth) thereof, and is restrained from continuing to refuse to carry out its obligations under said contract.

VI.

Plaintiff submits to the jurisdiction of this Court and offers to do equity.

Wherefore, plaintiff prays:

1. That its right to arbitration of said grievance be determined.

2. That defendant specifically be required to perform Section 10(A)(Fifth) of said contract, particularly with respect to said contracting-out grievance which is heretofore described.

3. That defendant be restrained from in any manner failing or refusing to perform its obligations under said Section 10(A)(Fifth) and particularly with respect to said contracting-out grievance.

4. That defendant be temporarily restrained and enjoined by injunction of this Court and in the form prayed above, and that upon appropriate determination of this cause said injunction be made final.

5. That plaintiff may have such other and further relief as by this Honorable Court may be deemed just and equitable in the premises, all at the costs of defendant.

[fol. 5] 6. That appropriate process may issue commanding defendant to answer this Bill of Complaint and to abide by such Decree as this Honorable Court may make in the premises.

Arthur J. Goldberg, General Counsel United Steelworkers of America, AFL-CIO, 1001 Connecticut Ave., N.W., Washington 6, D. C.;

David E. Feller, Assoc. Gen. Counsel, United Steelworkers of America, AFL-CIO, 1001 Connecticut Ave., N.W., Washington 6, D. C.;

Cooper, Mitch, Black & Crawford, By Hugo L. Black, Jr., 1329 Brown-Marx Bldg., Birmingham 3, Alabama,

Attorneys for Plaintiff.

[File endorsement omitted]

[fol. 6]

EXHIBIT "A" TO COMPLAINT

Agreement Between Warrior & Gulf Navigation Company and United Steelworkers of America, AFL-CIO.

Maintenance Men and Harbor Tug Barge Men
Chickasaw Terminal.

September 25, 1956.

Termination of Contract, September 25, 1959.

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[fol. 7] **Agreement Between Warrior & Gulf Navigation Company and United Steelworkers of America, AFL-CIO.**

Maintenance Men and Harbor Tug Barge Men, Chickasaw Terminal.

This Agreement dated September 25, 1956, by and between Warrior & Gulf Navigation Company, hereinafter referred to as the Company, and the United Steelworkers of America, AFL-CIO, hereinafter referred to as the Union.

Witnesseth:

Section 1.

Intent of Parties.

It is the intent and purpose of the parties hereto to set forth herein the basic agreement covering rates of pay and conditions of employment to be observed between the parties herewith and to establish a procedure for prompt and equitable adjustment of grievances and eliminate all interferences to efficient Company operations. It is understood that this Agreement applies only to maintenance employees and harbor tug barge men at the Company's Chickasaw, Alabama, Terminal. The term "employees" as used in this Agreement shall accordingly include only such personnel for which the Union has the bargaining rights as certified by the National Labor Relations Board.

[fol. 8] Section 2.

Recognition.

The Company recognizes the Union as the exclusive collective bargaining agency for those employees as defined in Section 1. The Company also recognizes and will not interfere with the rights of its employees to become members of the Union. There shall be no discrimination, interferences, restraint, or coercion by the Company or any of its agents against any employees because of membership in the Union. The Union agrees not to intimidate or

coerce employees into membership, and that neither it nor any of its officers or members will engage in any Union activities on Company time or will engage other employees in any Union activities while the said employees are on Company time.

Section 3.

Illegal Suspension of Work.

A strike or stoppage of work on the part of the employees represented by the parties signatory hereto shall be a violation of this Agreement, and there shall be no strikes, work stoppages, interruptions, or impeding of work. Likewise, a lock-out on the part of the Company shall also be a violation of this Agreement.

[fol. 9]

Section 4.

Union Membership and Checkoff.

A. Union Membership:

1. Each employee who on the effective date of this Agreement is a member of the Union in good standing and each employee who becomes a member after that date shall, as a condition of employment, maintain his membership in the Union.

2. Each employee hired on or after September 25, 1956, shall, as a condition of employment, beginning on the 30th day following the beginning of such employment or the effective date of this Agreement, whichever is the later, acquire and maintain membership in the Union.

3. On or before the last day of each month the Union shall submit to the Company a notarized list showing the name of each employee who shall have become a member of the Union in good standing other than through the procedures as provided for in Section 2 above since the last previous list of such members was furnished to the Company. The Company shall continue to rely upon the membership lists which have been certified to it by the

Union as of June 1, 1950, subject to revision by the addition of new members certified to it by the Union between such date and the date of this Agreement and to the deletion of the names of employees who have withdrawn from membership during such period.

[fol. 10] B. Checkoff:

1. The Company will check off monthly dues, assessments and initiation fees, each as designated by the International Secretary-Treasurer of the Union, as membership dues in the Union, on the basis of individually signed voluntary checkoff authorization cards in forms agreed by the Company and the Union.

2. The Company will suggest that each new employee, when he signs an application for Union membership, as provided for in Sub-section A-2 above, voluntarily execute at the same time an authorization for the checkoff of Union dues in the form agreed upon. It is further understood that if any such employee mails to the Company a written notice of his election not to become a Union member in the manner and within the time limits specified in such Subsection A-2, any such authorization for deduction of dues which he may have signed shall be of no effect. A copy of such authorization card for the checkoff of union dues which shall have become effective as a result of the expiration of 30 days from the date of employment without receipt of such written notice from the employee shall be forwarded to the Financial Secretary of the Local Union along with the membership application of such employee.

3. New checkoff authorization cards, other than those provided for by Sub-section B-2 above, will be submitted to the Company through the Financial Secretaries of the Local Unions at intervals, no more frequent than once each month. On or before the last day of each month, the Union shall submit to the Company a summary list of cards transmitted in each month.

[fol. 11] 4. Deductions on the basis of authorization cards submitted to the Company shall commence with respect to dues for the month in which the Company receives such

authorization card or in which such card becomes effective, whichever is later. Dues for a given month shall be deducted from the first pay closed and calculated in the succeeding month.

5. In cases of earnings insufficient to cover deduction of dues, the dues shall be deducted from the next pay in which there are sufficient earnings, or a double deduction may be made from the first pay of the following month, provided however that the accumulation of dues shall be limited to two months. The International Secretary-Treasurer of the Union shall be provided with a list of those employed for whom double deduction has been made.

Section 5.

Wages.

Rates of pay for all employees covered by this Agreement shall be as follows:

Effective September 25, 1956

	Per Hour
Mechanics	$2.34
Mechanics Helpers	$1.82
Laborers	$1.715
Harbor Tug Barge Men	$1.82

Effective September 25, 1957

	Per Hour
Mechanics	$2.43
Mechanics Helpers	$1.89
[fol. 12] Laborers	$1.785
Harbor Tug Barge Men	$1.89

Effective September 25, 1958

	Per Hour
Mechanics	$2.52
Mechanics Helpers	$1.96
Laborers	$1.855
Harbor Tug Barge Men	$1.96

All of the above rates are to supersede the old rates which prevailed prior to the date of this Agreement. These obsolete rates were as follows:

	Per Hour
Mechanics	$2.24
Mechanics Helpers	$1.72
Laborers	$1.615
Harbor Tug Barge Men	$1.72

This section is intended only to provide a basis for calculating earnings and shall not be construed as a guaranty of work.

Cost-of-Living Adjustment:

1. If the Consumer Price Index of the Bureau of Labor Statistics, U. S. Department of Labor (1947-1949 100), hereafter referred to as the BLS Consumer Price Index, shall increase from the September 25, 1956, level of 117.1 to a level above 117.4, there shall be added to the straight-time hourly earnings of each employee a cost-of-living adjustment in accordance with the following table and provisions:

[fol. 13]

BLS Consumer Price Index	Cost-of-Living Adjustment
117.4 or less	None
117.5—117.9	1¢ per hour
118.0—118.4	2¢ per hour
118.5—118.9	3¢ per hour
119.0—119.4	4¢ per hour

and so forth, with a one cent change in the Adjustment for each 0.4 or 0.5 point change in the Index, whichever is appropriate, based on the sequence of changes set forth in the above table.

2. Changes in any Adjustment shall be made, if appropriate, only commencing with the first pay period beginning on or after each March 1 and October 1, beginning March 1, 1957, and shall be based on the first published

BLS Consumer Price Index as of the prior January 15 and August 15 respectively. The amount of the change in the Cost-of-Living Adjustment shall be the difference between the amount provided in the above table and any Cost-of-Living Adjustment already in effect pursuant to this Sub-section.

3. Notwithstanding any decrease in the BLS Consumer Price Index, there shall not be any decrease in any existing Cost-of-Living Adjustment in accordance with the above table, unless the amount of the decrease in the Adjustment under such table is at least 2 cents, at which time the full amount of the appropriate decrease shall be made.

4. If the BLS Consumer Price Index for any January 15 or August 15 shall not be available by the following [fol. 14] March 1 or October 1 as the case may be, any change in the Adjustment pursuant to such later reported Index shall be made effective as of the pay period beginning on or after March 1 or October 1 which would have been applicable had the Index not been published late.

5. If the BLS Consumer Price Index in its present form and calculated on the same basis shall be revised therefrom or discontinued, the parties shall attempt to adjust this clause, or if agreement is not reached, the parties shall request the Bureau of Labor Statistics to provide an appropriate conversion or adjustment, which shall be applicable as of the appropriate adjustment date and thereafter.

Section 6.

Hours of Work.

The eight hour day and the forty hour week heretofore established by the Company shall remain in effect and the Company shall continue to pay time and one-half for all overtime in excess of eight hours in any one day or for all overtime in excess of forty hours in any one week.

At the option of the Company, a day may be either a calendar day or any twenty-four hour period.

By mutual consent of both parties, a week may be either a calendar week or any regularly established seven-day period.

[fol. 15] No employee shall be worked more than six consecutive days without twenty-four hours rest, except in cases of extreme emergency.

Time and one-half shall be paid for all time worked (sic) ly overtime for the same hours so worked.

An employee shall not be paid both daily and weekly overtime for the same hours so worked.

This section is intended only to provide a basis for calculating overtime and shall not be construed as a guaranty of hours of work per day or per week.

When employees are directed to work and, due to rain or other interference, also change in plans, no work is begun, employee will be dismissed and allowed two (2) hours time at his regular established rate.

In the event an employee actually begins work and by reason of weather interference or other cause is prevented from completing his regular shift, he shall be allowed a minimum of four (4) hours at his regular established rate. Any service performed in excess of four (4) hours shall be paid for, to the nearest quarter hour worked.

The above time allowed but not worked shall not for the purpose of these regulations be considered as overtime.

Allowance for Jury Service:

An employee who is called for jury service shall be excused from work for the days on which he serves and [fol. 16] he shall receive, for each such day of jury service on which he otherwise would have worked, the difference between 8 times his average straight-time hourly earnings (as computed for holiday allowance) and the payment he receives for jury service. The employee will present proof of service and of the amount of pay received therefor.

Section 7.

Irregular Work.

When an employee absents himself from his work for a period of two days without the consent of the Company, other than because of proven sickness or a satisfactory explanation, he may be discharged. When any employee

makes a habit of laying off for single days other than because of proven sickness and continues to do so after having been warned by the Company, he shall be subject to discharge.

Section 8.

Vacations.

To be eligible for a vacation in any calendar year during the term of this Agreement, the employee must:

a. Have one year or more of continuous service; and

b. Not have been absent from work for six consecutive months or more in the preceding calendar year; except that in case of an employee who completes one year of [fol. 17] continuous service in such calendar year, he shall not have been absent from work for six consecutive months or more during the 12 months following the date of his original employment; provided, that an employee with more than one year of continuous service who in any year shall be ineligible for a vacation by reason of the provisions of this paragraph as a result of an absence on account of layoff or illness shall receive one week's vacation with pay in such year if he shall not have been absent from work for six consecutive months or more in the 12 consecutive calendar months next preceding such vacation.

An eligible employee who has attained the years of continuous service indicated in the following table in any calendar year during the term of this Agreement shall receive a vacation corresponding to such years of continuous service and, effective January 1, 1958, extra vacation as shown in the following table:

Years of Service	Vacation	Extra Vacation Effective January 1, 1958
1 or more	1 week	0
3 or more	1 week	½ week
5 or more	2 weeks	0
10 or more	2 weeks	½ week
15 or more	3 weeks	0
25 or more	3 weeks	½ week

The term continuous service as used above means service which is unbroken in continuity by (a) quit, (b) discharged for proper cause, (c) permanent shutdown of operations [fol. 18] where there is a break in employment of two years or more, (d) absence due to lay off or physical disability, either of which continues for more than two years. Continuous service shall not be considered broken by absence of any employee who subsequent to May 1940 entered the military, marine, or naval service of the United States, and who retains re-employment rights under the law and complies with requirements of law as to re-employment and is reemployed. Continuous service shall include only service with the Warrior & Gulf Navigation Company or with the predecessor company (Tennessee Coal, Iron & Railroad-Water Transportation Department), whose obligations were assumed by the Warrior & Gulf Navigation Company when it acquired the water transportation property and related interests of this firm. Vacations granted under this section will be paid the employee at his average rate of earnings per hour for the four weekly pay periods closed and calculated immediately preceding the vacation period. The total hours of vacation pay will be the average hours they worked per week during the four week period, but not less than forty hours or more than forty-eight hours for each weekly vacation period. Employees entitled to one week's vacation will be required to take it in a single uninterrupted period. Employees entitled to two weeks' vacation may be required to either take such vacation in a single period, or in two weekly periods. Employees entitled to three weeks' vacation may be required to either take such vacation in a single period or in weekly periods spaced as may be necessary, to conform with the following requirements: vacations will, so far as possible, be granted at times most desired by the employee, but the final right to allotment of [fol. 19] all vacation periods is exclusively reserved to the Company in order to insure an orderly operation.

Section 9.

Seniority.

It is understood and agreed that in all cases of increase or decrease of forces, and promotion, the following factors shall be considered:

(1) Ability to perform the work.

(2) Physical fitness.

(3) Continuous service.

Promotions shall be from Laborer to Mechanic Helper. Only where factors (1) and (2) are relatively equal shall length of continuous service be the determining factor. The seniority rating of all employees covered by this Agreement shall be determined by the continuous service record with the Warrior & Gulf Navigation Company or with the predecessor company (Tennessee Coal, Iron & Railroad—Water Transportation Department) whose obligations were assumed by the Warrior & Gulf Navigation Company when it acquired the water transportation property and related interests of this firm.

The term "continuous service" as used above means service which is unbroken in continuity by (a) quit, (b) discharge for proper cause, (c) permanent shutdown of [fol. 20] operations where there is a break in employment of two (2) years or more, (d) absence due to lay off or physical disability either of which continues for more than two (2) years. Continuous service shall not be considered broken by absence of any employee who subsequent to May 1940 entered the military, marine or naval service of the United States and who retains re-employment rights under the law and complies with requirements of the law as to re-employment and is reemployed.

New employees have no seniority rights and may be laid off without regard to their length of service during the first thirty (30) working days of employment.

Old employees promoted to new job classifications have no seniority rights in such job classification and may be returned to their previous job classification without regard to their length of service during the first thirty (30) work-

ing days of employment in the new job classification. Seniority shall start and be calculated beginning with the first day on the new job or new assignment provided such job or assignment is retained beyond the 30th day of employment in this job classification.

The Company will within sixty (60) days of execution of this Agreement provide each affected employee with a record of his seniority as of the day the list is issued. Any employee who has grievance with regards to such a record may present the same within thirty (30) days thereafter and the grievance shall be adjusted under the Grievance [fol. 21] and Arbitration committee provided for in this Agreement. Unless a grievance is submitted, the record shall become final.

Employees shall lose all seniority rights if (a) they resign or quit, (b) they are discharged for proper cause, (c) they do not report for work after a period of lay off when notified by registered mail to report, unless within three (3) days, they present a reasonable excuse, (d) they have been laid off for a period of two (2) years or more.

Leave of absence may be given in writing by the Company at its discretion providing such absence does not exceed a period of ninety (90) days. Full seniority will be retained by employees who may be granted a Leave of Absence under the foregoing conditions.

Section 10.

Adjustment of Grievances.

Issues which conflict with any Federal statute in its application as established by Court procedure or matters which are strictly a function of management shall not be subject to arbitration under this section.

Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise, there shall be no suspension of work on account of such differences, but an earnest effort shall be made to settle such differences immediately in the following manner:

[fol. 22] A. For Maintenance Employees:

First, between the aggrieved employees, and the Foreman involved; Second, between a member or members of the Grievance Committee designated by the Union, and the Foreman and Master Mechanic.

Third, between a member or members of the Grievance Committee and at the option of such committee a representative of the National Organization of the Union, and the Vice President;

Fourth, between the representatives of the National Organization of the Union and the representatives of the Executives of the Company; and

Fifth, if agreement has not been reached the matter shall be referred to an impartial umpire for decision. The parties shall meet to decide on an umpire acceptable to both. If no agreement on selection of an umpire is reached, the parties shall jointly petition the United States Conciliation Service for suggestion of a list of umpires from which selection will be made. The decision of the umpire shall be final. The expense and salary incident to the services of the umpire shall be paid jointly by the Company and the Union.

B. Harbor Tug Barge Men:

First, between the aggrieved employees, and the Terminal Superintendent.

Second, between a member or members of the Grievance Committee designated by the Union, and the Terminal Superintendent and Personnel Officer.

[fol. 23] Third, between a member or members of the Grievance Committee and at the option of such committee a representative of the National Organization of the Union, and the Vice President.

Fourth, between the representatives of the National Organization of the Union and the representatives of the Executives of the Company; and

Fifth, if agreement has not been reached the matter shall be referred to an impartial umpire for decision. The

parties shall meet to decide on an umpire acceptable to both. If no agreement on selection of an umpire is reached, the parties shall jointly petition the United States Conciliation Service for suggestion of a list of umpires from which selection shall be made. The decision of the umpire shall be final. The expense and salary incident to the service of the umpire shall be paid jointly by the Company and the Union.

Pending the hearing of disputes, the employees represented by the parties signatory hereto shall not cease work because of any dispute; and a decision reached at any state of the proceeding shall be binding on both parties thereto; and shall not be subject to re-opening by any other party except by mutual agreement.

Specified periods shall be agreed upon between the Grievance Committee and the Vice President for the presentation of grievances hereunder. Provided, however, that matters pertaining to discharge or other matters that cannot reasonably be delayed until the time of the next regular meeting [fol. 24] may be presented at any time in accordance with the foregoing provision.

The Grievance Committee shall consist of not less than two (2) and not more than four (4) employees in the bargaining unit here involved, designated by the Union, who will be afforded such time off without pay as may be required,

First, to attend regularly scheduled committee meetings,

Second, to attend meetings pertaining to discharges or to other matters which cannot reasonably be delayed until the time of the next regular meeting.

The actual number of members of the Grievance Committee shall be mutually agreed upon between the Vice President and the Union.

Section 11.

Management.

The management of the Company and the direction of the working forces, including the right to hire, suspend or discharge for proper cause, or transfer, and the right to

relieve employees from duty because of lack of work, or for other legitimate reasons, is vested exclusively in the Company, provided that this will not be used for purposes of discrimination against any member of the Union.

[fol. 25]

Section 12.

Discharge Cases.

In the event a member of the Union shall be discharged from his employment from and after the date hereof, and he believes he has been unjustly dealt with, such discharge shall constitute a case arising under the method of adjusting grievances herein provided. In the event it should be decided under the rules of this Agreement that an injustice has been dealt the employee with regard to the discharge, the Company shall reinstate such employee and pay full compensation at the employee's regular rate for the time lost. All such cases of discharge shall be taken up within five (5) days from the date of discharge and disposed of as promptly as possible.

Section 13.

Safety and Health.

The Company shall continue to make reasonable provisions for the safety and health of its employees during the hours of their employment. Protective devices and other equipment necessary to properly protect employees from injury shall be provided by the Company in accordance with the practice now prevailing.

Section 14.

Holidays.

The following days shall be considered holidays during which there shall be no regular work which can be reasonably deferred:

[fol. 26] New Years.

Mardi Gras Day.

Good Friday.*

*(By local agreement prior to April 1st, this holiday may be substituted for another holiday.)

July 4th.

Labor Day.

Thanksgiving.

Christmas.

Employees required to work on a holiday above enumerated shall be paid at the rate of double the regular rate of pay for all hours worked during such holidays. If the calendar holiday is on Sunday, for the purpose of this Agreement, the holiday shall be the following Monday.

1. Effective as of the date of this Agreement, an eligible employee who does not work on a holiday listed above shall be paid eight (8) times his average straight time hourly rate of earnings (excluding over time premium), during the payroll period in which the holiday occurs provided however, that if an eligible employee who is scheduled to work on such holiday fails to report or perform his schedule or assigned work, he shall become ineligible to pay for the unworked holiday unless he has failed to report or perform such work because of sickness or because of death [fol. 27] in the immediate family (mother, father, including in-laws, children, brothers, sisters, husbands, wives, and grand parents), or because of similar good cause.

2. The term "eligible employee" as used above, is one who (a) has completed thirty (30) terms of work since his last hire; (b) performs work in the payroll period in which the holiday occurs and (c) works as scheduled or assigned, both on his last schedule work day period to and on his first schedule work day following the holiday unless he has failed to so work because of sickness or because of death in the immediate family or because of similar good cause.

3. A part time employee who is otherwise eligible shall receive pay for a holiday not worked on the basis of his total hours worked in the pay period in which the holiday

is observed, divided by ten (10), times his straight time hourly rate of earnings in such pay period (excluding the overtime premium).

4. When holiday occurs during an eligible employee's scheduled vacation, he shall be paid for the unworked holiday in addition to his vacation pay.

5. Under existing arrangements, when weekly pay periods are used, the pay period for the purpose of this section shall include the weekly period in which the holiday occurs and next preceding pay period. When an employee's scheduled vacation coincides with the pay period in which the holiday occurs, the next preceding pay period work shall be [fol. 28] used for the purpose of calculating his pay for the unworked holiday.

6. If an eligible employee performs work on a holiday but works less than eight (8) hours, he shall be entitled to the benefits of this section to the extent that the number of hours worked by him on the holiday is less than eight (8).

7. Holidays, whether worked or not, shall be credited only as a single day for the purpose of computing weekly overtime under the provisions of Section 6, "Hours of Work."

8. For all hours worked by an employee on any of the Holidays specified above, overtime shall be paid at the overtime rate of:

a. Effective as of the date of this Agreement the employee shall receive two times his regular rate of pay.

b. Effective July 1, 1957, the employee shall receive two and one-tenth times his regular rate of pay.

c. Effective July 1, 1958, the employee shall receive two and one-fourth times his regular rate of pay.

Section 15.

Duration of Agreement.

All terms and conditions of this Agreement shall continue in full force and effect until midnight, September 25,

[fol. 29] 1959, and thereafter from year to year unless either party shall notify the other in writing at least sixty (60) days prior to September 25, 1959, or any anniversary thereof, of the intention of changing, modifying, or terminating this Agreement.

In Witness Whereof, The Warrior & Gulf Navigation Company, has caused these presents to be signed by its duly authorized officers and its corporate seal to be affixed hereto; and the United Steelworkers of America has caused these presents to be signed by its duly authorized officers and its seal to be affixed hereto, all on the day and year first above written.

WARRIOR & GULF NAVIGATION COMPANY,

By (S.) W. I. MCELROY,

By (S.) A. D. FULMER.

UNITED STEELWORKERS OF AMERICA, CIO-AFL,

By (S.) DAVID J. MCDONALD,

By (S.) I. W. ABEL,

By (S.) HOWARD R. HAGUE,

By (S.) R. E. FARR,

By (S.) B. F. GAGE,

By (S.) A. RODRIGUEZ,

By (S.) EUGENE WILLCUTT.

[fol. 30]

IN UNITED STATES DISTRICT COURT

MOTION FOR PRELIMINARY INJUNCTION

Received E. Oct. 17, 1958, C-1467, U. S. Marshal, Mobile, Ala.

Now comes the plaintiff, United Steelworkers of America, AFL-CIO, an unincorporated association, and moves this Honorable Court for a preliminary injunction against the defendant, until a further order of this Court, conformable to the prayer of the complaint filed herein, and respectfully requests this Court to fix a date for a hearing on this Motion and to order defendant to show cause on that date why such preliminary injunction should not be granted and to fix the form and extent of the notice of such hearing to be given to defendant, and for all such other and further relief as may seem to the Court right and proper.

Arthur J. Goldberg, General Counsel, United Steelworkers of America, AFL-CIO, 1001 Connecticut Ave., N.W., Washington 6, D.C.;

David E. Feller, Assoc. Gen. Counsel, United Steelworkers of America, AFL-CIO, 1001 Connecticut Ave., N.W., Washington 6, D.C.;

[fol. 31] Cooper, Mitch, Black & Crawford, By Hugo L. Black, Jr., 1329 Brown-Marx Bldg., Birmingham 3, Alabama,

Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

ORDER SETTING DATE FOR HEARING—October 16, 1958

Upon due consideration, it is hereby Ordered that plaintiff's foregoing Motion for Preliminary Injunction filed herein this date be and the same is hereby set down for hearing at 9:30 A.M. on October 30, 1958, at the United States District Court House, Mobile, Alabama.

Done this 16th day of October, 1958.

Daniel H. Thomas, United States District Judge.

U. S. District Court, Sou. Dist. Ala., Filed and Entered This The 16 day of October, 1958.

Marshal's Return (omitted in printing).

[fol. 33] [File endorsement omitted]

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

[Title omitted]

SUMMONS AND RETURN

To the above named Defendant: at Chickasaw, Alabama:

You are hereby summoned and required to serve upon plaintiff's attorneys:

Mr. Arthur J. Goldberg, General Counsel, United Steelworkers of America, AFL-CIO, 1001 Connecticut Ave., N.W., Washington 6, D. C.;

Mr. David E. Feller, Assoc. Gen. Counsel, United Steelworkers of America, AFL-CIO, 1001 Connecticut Ave., N.W., Washington 6, D. C.; and

Mr. Hugo Black, Jr., Attorney, and Firm, 1329 Brown-Marx Bldg., Birmingham 3, Alabama.

an answer to the complaint which is herewith served upon you, within 20 (Twenty) days after service of this sum-
[fol. 34] mons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

William J. O'Connor, Clerk of Court, Minnie Pearl Cox, Deputy Clerk.

(Seal)

[Seal of Court]

Date: October 16, 1958.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

Return on Service of Writ.

I hereby certify and return, that on the 17th day of October 1958, I received this summons and served it together with the complaint herein as follows: By handing a copy of each to Mr. W. I. McElroy, Vice-President of Warrior & Gulf Navigation Company at Chickasaw, Alabama on October 17th, 1958 at 11:10 A.M.

J. L. May, United States Marshal, By G. V. Manley, Jr., Deputy United States Marshal.

Marshal's Fees.
Travel $1.40.
Service 2.00.

[fol. 35]

In United States District Court

Motion to Dismiss—Filed October 27, 1958

Defendant, Warrior & Gulf Navigation Company, moves this Court to dismiss plaintiff's complaint and the rule for preliminary injunction issuing herein for the following reason:

Plaintiff's complaint fails to state a claim against defendant upon which relief can be granted.

October 25, 1958.

Samuel Lang, Kullman & Lang, 800 Whitney Building, JA 5-2351, New Orleans 12, Louisiana; and

T. K. Jackson, Jr., Armbrecht, Jackson, McConnell & DeMouy, Merchants National Bank Building, HE 3-1891, Mobile, Alabama,

Attorneys for Defendant.

Certificate of Service (omitted in printing).

[fol. 36]

IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION TO DISMISS—Filed October 27, 1958

To: Arthur J. Goldberg, General Counsel, United Steelworkers of America, AFL-CIO, 1001 Connecticut Avenue, N.W., Washington 6, D. C.;

David E. Feller, Associate General Counsel, United Steelworkers of America, AFL-CIO, 1001 Connecticut Avenue, N.W., Washington 6, D. C.;

Hugo L. Black, Jr., Cooper, Mitch, Black & Crawford, Attorneys at Law, 1329 Brown-Marx Building, Birmingham 3, Alabama.

Please take notice that the undersigned will bring on for hearing the Motion to Dismiss the action herein before [fol. 37] the United States District Court for the Southern District of Alabama, Southern Division, on October 30, 1958, at 9:30 A.M. or as soon thereafter as Counsel may be heard.

October 25, 1958.

Samuel Lang, Kullman & Lang, 800 Whitney Building, JA 5-2351, New Orleans 12, Louisiana; and

T. K. Jackson, Jr., Armbrecht, Jackson, McConnell & DeMouy, Merchants National Bank Building, HE 3-1891, Mobile, Alabama,

Attorneys for Defendant.

Certificate of Service (omitted in printing).

[fol. 38] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS—Filed October 27, 1958

The complaint fails to state a claim against defendant upon which relief can be granted.

This action is grounded on a written labor agreement, a copy of which is made a part of the complaint. This

agreement specifies in the first sentence of the section providing for arbitration, Section 10, page 15 of Exhibit "A" attached to the complaint, that "matters which are strictly a function of management shall not be subject to arbitration." It is alleged that agreement prohibits, or can be construed to forbid, defendant employer's subcontracting out certain maintenance or repair work; that, therefore, the plaintiff union's protest against such subcontracting is arbitrable under that contract and defendant should be ordered to proceed to arbitration thereon.

The issue presented is not a novel one, and it has been held by all the Courts which have reviewed the subject that management's inherent and traditional right to subcontract may not be questioned (or subjected to arbitration) in the absence of an express limitation thereof set forth in the labor agreement. The following cases are in point:

[fol. 39] 1. Dairy, Bakery and Food Workers v. Grand Rapids Milk Division, Dairy Products Corporation, 1958, U. S. District Court, Western Division, Michigan, 160 F. Supp. 34, where a dairy discontinued its retail routes and turned the work over to independent contractors.

2. United Dairy Workers v. Detroit Creamery Company, Michigan, Circuit Court, Wayne County, in Chancery, No. 541,758, decided April 18, 1956; 30 Labor Cases 70, 115, 38 LRRM 2302. Here the company subcontracted its iceless refrigeration needs, thereby effecting a saving of $100,000.00 a year. The labor contract did not contain a management rights or prerogatives provision (one is found in the contract involved here), and (unlike the instant case's agreement) there was a contractual limitation on layoffs "as long as there is sufficient work to be done." Nonetheless the Court held that in the absence of a specific contract reference to subcontracting, the right to arbitrate did not exist. The Court said, "I have read the contract from beginning to end and I am unable to find any place in the contract where the Company has given up its managerial right to subcontract, nor confided to arbitrators the right to review their business judgment in abandoning a department."

3. The 5th U. S. Circuit Court of Appeals held to the same effect in Amalgamated Assn. of Street, Electric Railway and Motorcoach Employees of America v. Greyhound Corporation, 1956, 231 F. 2d 585, 57 ALR 2d 1394, where the employer obtained a declaratory judgment of its right under its contract with a union to subcontract janitorial work in a bus terminal, causing the discharge of a number [fol. 40] of employees. Expressing the view that the law on this point heavily favors management, the Court held that in the absence of an express provision in the labor agreement giving up its right to do so, a company may discontinue all or part of its operations. See, also, sustaining this principle, U. S. Steel Corporation v. Nichols, 6th Circuit, 1956, 229 F. 2d 396, cert. den., U. S. Sup. Ct., 351 U. S. 950.

4. Cf. Timken Roller Bearing Company v. NLRB, 6th Circuit, 1947, 161 F. 2d 949, and NLRB v. Adkins Transfer Company, 6th Circuit, 1955, 226 F. 2d 325, recognizing subcontracting to be an inherent management right which especially may not be taken from an employer where, as here, there is a contract provision recognizing the existence of and reserving management's rights and there is no express limitation on subcontracting in the contract.

The gravity of the attempt to force defendant to arbitration on this subcontract issue before an arbitrator who may not be a lawyer experienced in contract interpretation, or before an arbitrator without extensive business experience, is that no appeal lies anywhere from an arbitrator's findings of fact or conclusions of law—yet defendant's very right to efficient and profitable operation of its business is at stake under a contract which nowhere restricts subcontracting.

[fol. 41] Conclusion.

The complaint should be dismissed.

Respectfully submitted this 25th day of October, 1958.

Samuel Lang, Kullman & Lang, 800 Whitney Building, JA 5-2351, New Orleans 12, Louisiana; and

T. K. Jackson, Jr., Armbrecht, Jackson, McConnell & DeMouy, Merchants National Bank Building, HE 3-1891, Mobile, Alabama,
Attorneys for Defendant.

Certificate of Service (omitted in printing).

[File endorsement omitted]

[fol. 42]

IN UNITED STATES DISTRICT COURT

OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION—Filed October 27, 1958

Comes now the defendant, Warrior & Gulf Navigation Company, and opposes plaintiff's motion for preliminary injunction for the following reasons:

1. The granting of the preliminary injunction prayed for would have the effect of deciding the issues before a hearing on the merits.

2. Plaintiff's rights will not be further jeopardized pending a trial on the merits and greater injury will be inflicted upon defendant than upon plaintiff if the preliminary injunction is granted.

3. Plaintiff's petition fails to affirmatively show any need for the issuance of a preliminary injunction.

4. The object of a preliminary injunction is to maintain the status quo; the granting of a preliminary injunction herein would have the opposite effect.

Samuel Lang, Kullman & Lang, 800 Whitney Building, JA 5-2351, New Orleans 12, Louisiana; and

[fol. 43] T. K. Jackson, Jr., Armbrecht, Jackson, McConnell & DeMouy, Merchants National Bank Building, HE 3-1891, Mobile, Alabama,
Attorneys for Defendant.

Certificate of Service (omitted in printing).

[File endorsement omitted]

[fol. 44]

IN UNITED STATES DISTRICT COURT

ANSWER—Filed October 27, 1958

First Defense.

Defendant admits the allegations of Paragraphs I and II of the complaint, except the allegation that it has violated the contract, which is denied; defendant admits the presentation of a grievance and its refusal to have it arbitrated, but otherwise denies the allegations of Paragraph III; defendant denies the allegations of Paragraphs IV and V; Paragraph VI of the complaint requires no answer.

Second Defense.

Defendant has over a period of years pursued in the regular course of business the practice of subcontracting work of the type involved in this complaint with reference to subcontracting, without any grievances, demand for redress, or request for arbitration.

Third Defense.

Questions regarding and objections to this practice of subcontracting such work were raised during negotiation of this labor contract; plaintiff, therefore, is presently seeking to force arbitration to try by that means to have the contract "judicially" amended to give it a benefit which it voluntarily gave up for other benefits in collective bargaining negotiations.

[fol. 45]

Fourth Defense.

Plaintiff seeks to compel the employment, in work traditionally subcontracted out by defendant, of employees hired for construction work which is no longer available, and which for a long period of time has not been available.

Wherefore, the defendant prays that this answer may be deemed good and sufficient and plaintiff's suit dismissed at its cost.

Samuel Lang; Kullman & Lang, 800 Whitney Building, JA 5-2351, New Orleans 12, Louisiana; and

T. K. Jackson, Jr., Armbrecht, Jackson, McConnell & DeMouy, Merchants National Bank Building, HE 3-1891, Mobile, Alabama,

Attorneys for Defendant.

Certificate of Service (omitted in printing).

[File endorsement omitted]

[fol. 46]

IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION TO STRIKE CERTAIN DEFENSES OF ANSWER AND ORDER OF SUBMISSION—October 30, 1958

This cause comes on to be heard in open Court on the Plaintiff's motion for a preliminary injunction, the Defendant's opposition to the Plaintiff's motion for a preliminary injunction and by agreement of counsel comes on further to be heard on the petition for a final injunction.

Now comes the Plaintiff by its Attorneys and orally move the Court to strike the Second, Third and Fourth Defenses of the Defendant's answer. Arguments are heard and after consideration thereof,

It Is Ordered by the Court that the Plaintiff's oral motion to strike the Second, Third and Fourth Defenses of the Defendant's answer be, and the same hereby is, Denied.

[fol. 47] Witness are examined, exhibits offered in evidence and the Plaintiff rests.

Witnesses are further examined and the Defendant rests.

Witnesses are further examined and the Plaintiff rests.

Thereupon, this cause is hereby submitted without argument.

It Is, Therefore, Ordered by the Court that this cause be, and the same hereby is, taken under Submission.

Made at Mobile, Alabama, this the 30th day of October A. D. 1958.

Daniel H. Thomas, United States District Judge.

[File endorsement omitted]

[fol. 48]

IN UNITED STATES DISTRICT COURT

TRANSCRIPT OF PROCEEDINGS Had Before Hon. Daniel H. Thomas, U. S. District Judge, at Mobile, Alabama, on October 30, 1958.

[Title omitted]

APPEARANCES:

For Plaintiff—Hugo Black, Jr., Esq.

For Defendant—Samuel Lang, Esq., and T. K. Jackson, Jr., Esq.

Judge Thomas: Civil Action No. 2100, United Steelworkers of America AFL-CIO, vs. Warrior & Gulf Navigation Company, what says the Plaintiff?

Mr. Jackson: May it please the Court, may I present at this time to the Court Mr. Samuel Lang of New Orleans, Louisiana. He is a member of the bar of the Supreme Court of the State of Louisiana and he has been admitted to practice before the United States Circuit Court of Appeals for the Fifth Circuit and the United States District Court for the Eastern District of Louisiana.

Judge Thomas: We are glad to have you, Mr. Lang. You are associated with him in this case?

Mr. Jackson: Yes, sir.

Judge Thomas: What says the Plaintiff?

COLLOQUY RE: MOTION TO DISMISS, MOTION TO STRIKE PARTS OF ANSWER AND ORDER DENYING MOTION TO STRIKE

[fol. 49] Mr. Black: Your Honor please, the Plaintiff is ready. I want to state this, if Your Honor please. On Monday of this week, I was in Tampa, Florida, trying a case, and Mr. Lang was kind enough to send some motions to my office on that date. My office forwarded that information to the Battle House. I received it yesterday when I came in. Consequently, I have had no time to

prepare certain responsive pleadings to the answer. There are three paragraphs I would move to strike. However, the Plaintiff is ready to try the case, if it is all right with the Defendant, if they have their witnesses today. I would as soon try the whole thing today and get rid of it rather than have it tried twice.

Judge Thomas: It comes up today on a preliminary injunction.

Mr. Black: Yes, sir. The evidence would be largely the same as for a permanent injunction.

Judge Thomas: What says the Defendant?

Mr. Lang: We are ready. We have filed a motion to dismiss, with a memorandum of authorities to support that motion. Of course, it is part and parcel of the same. We would prefer also to dispose of it today at one time, if possible, but we think the law question is so important that we would like to take that up first. We feel that the Court may feel, after hearing the arguments on the law, [fol. 50] that it is unnecessary to go into the evidence.

Mr. Black: I presume by that you want to take up the motion to dismiss first?

Mr. Lang: Yes, sir.

Mr. Black: That is perfectly all right with us.

Judge Thomas: It seems to me that the proper procedure is to take up the motion to dismiss. If that is granted, that ends it. If not, we will go into it. Both of you gentlemen want to hear it on both the preliminary injunction and permanent injunction. We have the Court reporter here.

Mr. Lang: If the motion to dismiss is not granted, we would like to suggest perhaps that the merits can be handled by affidavit.

Mr. Black: I would prefer to cross examine. I have my witnesses here live. Mr. Lang has his, too.

Mr. Lang: We are prepared to go into it by oral testimony.

[fol. 51] Mr. Black: I have not had an opportunity to file a little memorandum like Mr. Lang has, on the motion to dismiss, but I presume he has the right to open and close on that, since he is making the motion.

Judge Thomas: I note you have filed an answer, Mr. Lang, but we will go into the motion to dismiss first. You may proceed.

Mr. Black: When it comes time to deal with the answer, I would like to have leave to file an oral motion to strike. When I can get hold of my secretary, it will be put in writing.

Thereupon, counsel argued the motion to dismiss.

Judge Thomas: I reserve my ruling on this motion to dismiss, and I will hear the case on its merits.

Mr. Black: I would like at this time to file an oral motion to strike.

The Plaintiff moves to strike the second, third and fourth defenses set up in the answer, and as grounds therefor, says as follows:

1. Said defenses do not constitute defenses to the issue before the Court, namely, the issue of whether or not the grievance mentioned in the complaint should be arbitrated, but go to the merits of the grievance.

[fol. 52] 2. It is not for this Court to try out any defenses which the company might have to the grievance, which is made the basis of the complaint herein.

Respectfully submitted, Cooper, Mitch, Black and Crawford, By Hugo L. Black, Jr.

Mr. Black: If Your Honor please, I think the motion is well taken, and if Your Honor has any doubts about it, I would like to speak about a minute on it.

Judge Thomas: Motion denied. Go ahead.

Mr. Black: Exception.

Judge Thomas: Does either side ask for the rule?

Mr. Lang: Not on our part.

Judge Thomas: Do you, Mr. Black?

Mr. Black: No, sir.

Judge Thomas: All witnesses in this case come in and be sworn, please.

[fol. 53] Thereupon, the witnesses were duly sworn by Mr. T. T. Shepard, Chief Deputy United States Clerk.

Judge Thomas: Have seats back out there, please. You will be called.

Mr. Black: I want to point out to Your Honor that Paragraph 1 of the complaint, except that they breached the contract, is admitted by the answer. Paragraph 2 of the complaint, that is the execution of the contract, is admitted by the answer, and that the filing of the grievance alleged in Paragraph 3 is admitted, and it is admitted that the Plaintiff has duly requested the Defendant to arbitrate the grievance, and that the Defendant has failed to arbitrate the grievance. In Paragraph 3, as I see it, the only thing left in that paragraph is to prove that the company has been contracting out maintenance work and that maintenance work was under the contract when the contract was signed.

Judge Thomas: Mr. Lang, are you in accord, in that, the pleadings admit Paragraph 1 of the complaint, with the exception mentioned, admit Paragraph 2, and you admit that the grievance was filed?

Mr. Lang: I think that is all we have admitted, sir.

Mr. Black: You don't deny that you all refused to arbitrate?

[fol. 54] Judge Thomas: That is a conclusion that the arbitration was refused. I think that pretty well catalogues what we are in agreement on and what we are in disagreement on.

Mr. Black: I think it does.

WILLIE E. ESTES, being first sworn to speak the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. Black:

Q. What is your name, please?
A. Willie E. Estes.
Q. Where do you live, please, sir?
A. Wilmer, Route 6, Box 67.
Q. Were you ever employed by the Warrior & Gulf Navigation Company?

A. Yes, sir.

Q. How long were you employed by them?

A. Approximately eight years.

Q. What job did you have at the Warrior & Gulf Navigation Company?

A. At the Chickasaw plant and terminal, sir, welding, burning, ship fitting, pipe fitting.

Q. Anything else?

A. Plumbing a little.

Q. What was your classification?

A. Welder.

Q. Did you have a title, were you a mechanic?

[fol. 55] A. General mechanic.

Q. All right, sir. Now, did you ever work on barges?

A. Yes, sir.

Q. Owned by the company, while you were there?

A. Yes, sir.

Q. What kind of work did you do on those barges?

A. Welding, burning, ship fitting.

Q. Who laid that work out for you?

A. The foreman.

Q. Which foreman laid that work out for you?

A. At that time, Mr. Albert Jones.

Q. Was all this going on when the last contract with the Union was signed on September 25th, 1956?

A. Yes.

Q. Are you presently working for Warrior & Gulf Navigation Company?

A. No.

Q. When did you last work for them?

A. I believe that was in January of 1957.

Q. January of 1957?

A. Yes, that was the last employment, I believe.

Judge Thomas: Almost two years ago?

A. Yes, sir.

Mr. Black: Mr. Estes, before you left the Warrior & Gulf Navigation Company, did anything happen with reference to the work that you had been doing on the barges there?

[fol. 56] A. Anything happen?

Q. Yes, sir, what about the volume of the work on the barges, what happened to it?

A. Well, it was left there, that is all I know.

Q. After you were laid off, did you go to work for another concern?

A. Yes, sir.

Q. Where?

A. Harrison Brothers Dry Dock, at Blakely Island.

Q. How long have you worked for Harrison Brothers Dry Dock at Blakely Island?

A. Nearly two years, sir, from the time I got laid off out there up until now.

Q. What type of work have you been doing for Harrison Brothers?

A. Welding, burning, ship fitting, pipe fitting.

Q. Have you been doing any work on Warrior & Gulf barges?

A. I have.

Q. What type of work have you been doing on Warrior & Gulf barges?

A. Burning, welding, ship fitting.

Q. Is that the same type of work and the same work that you were doing on the same barges that you worked on at Warrior & Gulf Navigation Company?

A. Yes, sir.

Q. Who lays out the work for you? Did Mr. Jones ever lay it out for you at Harrison Brothers?

A. Mr. Jones comes down there and Mr. Martin comes down there.

Q. Whose employee is Mr. Jones?

A. The Warrior & Gulf's.

[fol. 57] Q. Is that the same Mr. Jones who laid your work out for you at Warrior & Gulf, when you worked there?

A. That is right.

Q. Now, Mr. Jones, who is still an employee of Warrior & Gulf Navigation Company, comes down to Harrison Brothers and lays out your work for you there?

A. He shows the boss down there what he wants done.

Q. You said another man came down there. Who is that?

A. Mr. Martin usually comes, but Mr. Jones comes, too.

Q. Who is Mr. Martin?

A. Well, he is an employee of Warrior & Gulf Navigation Company.

Judge Thomas: In what capacity?

A. I don't know, sir.

Mr. Black: What did Mr. Martin do for Warrior & Gulf Navigation Company, when you were out there?

A. I don't know.

Q. (Mr. Black continuing): What does Mr. Martin do, when he comes down to Harrison Brothers?

A. He just shows what he wants done on the barges.

Q. What does he do? How does he show what he wants done?

[fol. 58] A. He carries our boss now where I am employed around and shows him what he wants done and he marks it up.

Q. How does he mark it?

A. Mr. Martin and our boss, and Mr. Albert Jones, when he comes down there, mark it with yellow crayon.

Q. Just as he did when you worked for Warrior & Gulf Navigation Company?

A. That is right.

Q. Down at Harrison Brothers, do you work under a Union contract?

A. No, sir.

Q. Do you get vacation pay down at Harrison Brothers?

A. No, sir.

Q. Did you get vacation pay under the union contract at Warrior & Gulf Navigation Company?

A. I did.

COLLOQUY BETWEEN COURT AND COUNSEL

Judge Thomas: Does that have anything to do with the merits of this case? Isn't that window dressing?

Mr. Black: No, sir. I understood, when I moved to strike the portions of the answer that I moved to strike,

that you wanted to go into the merits of the grievance. The arbitrators have considered relevant the wages that he was getting at the new place, where his old boss came down directing the work—it was an attempt by the compan—

[fol. 59] Judge Thomas: Is not the whole question in this case whether they are required to arbitrate or not?

Mr. Black: That was my conception, but not the conception of Mr. Lang. That is the reason why I was going into this.

Judge Thomas: Mr. Lang, is not the question: Are they required to arbitrate or not?

Mr. Lang: Yes, sir. In answer to counsel's reference to the defense subsidiary to the basic question or to other questions such as that, Your Honor noted that this witness was laid off almost two years ago, this is a matter of estoppel and a matter of continuous practice not objected to and a matter of fact that this union itself has by inference and by much the same manner bargained away its right to the subcontracting and of initiating any protest during a period when a new contract was sought for this very thing and then yielding to the company's refusal to include such portion. Those are legal defenses to the question of arbitrability.

Mr. Black: I want to point out again the point I was trying to make. Apparently, I may not have made it clear enough. What he is saying is what he wants to do. He wants to present to Your Honor the defenses he would have before an arbitrator. We would like to admit the question of arbitrability. He is trying to get Your Honor to rule on the merits of this case—

[fol. 60] Judge Thomas: The sole question in this case is: Are they required to arbitrate under the terms of the contract or are they not. That is the issue in this case.

Mr. Black: For my own clarification and conduct, if Your Honor please, in putting on testimony, does Your Honor have as broad a conception of what the word "arbitrability" embraces as my good friend, Mr. Lang, who just, in effect, said that arbitrability means that Your Honor should decide the merits of the grievance?

Judge Thomas: I will state it again. The sole question in this case is: Are they required to arbitrate under Paragraph 10 or not? That is as plain as I know how to put it.

Mr. Black: On Your Honor's earlier statement that's what I was saying was window dressing, I will put two and two together and will turn this witness over to Mr. Lang.

Judge Thomas: It is a question of what work the gentleman did up there. Mr. Estes, I want to ask you this: You were laid off, were you not?

A. Yes, sir.

Judge Thomas: At Warrior & Gulf Navigation Company?

A. Yes, sir.

[fol. 61] Judge Thomas: Why were you laid off?

A. I don't know, sir. He didn't say.

Judge Thomas: But you are doing the same work at Harrison Brothers that you did do up there?

A. Yes, sir.

Cross examination.

By Mr. Lang:

Q. Mr. Estes, did you file a grievance with the Warrior & Gulf Navigation Company, after you were laid off in January 1957?

A. Did I file one?

Q. Yes, sir? Did you or your union, on your behalf, file a grievance with the Warrior & Gulf Navigation Company at the time you were laid off in January 1957, protesting your lay off?

A. Well, I don't know, sir, if they were filed.

Mr. Black: We will stipulate he filed no such grievance. The grievance with which we are concerned here is the one mentioned in the complaint filed on August 22nd, 1958.

Judge Thomas: It is stipulated that he filed no grievance.

Mr. Lang: May we also stipulate that there have been no lay offs since early January 1957?

[fol. 62] Mr. Black: If Your Honor please, I think that is correct.

Judge Thomas: I think it should further be stipulated how many were laid off.

Mr. Black: At the time the contract was signed, there were one hundred and two mechanics and helpers employed at the Chickasaw Terminal. There are now twenty-one.

Mr. Lang: Those are not the facts. The facts are and I think we ought to state them fully that there was a period of new construction, prior to which this company had approximately the same number of employees as today. It has had in this work, during the period of construction, which extended over a period of ten years immediately following World War II, fluctuations in the number of employees.

Mr. Black: I don't think that has a thing in the world to do with your question.

Mr. Lang: I am getting to the number of employees. At the time the contract was signed, there were sixty employees.

Mr. Black: And immediately earlier there were one hundred and two.

[fol. 63] Mr. Lang: At the time the contract was signed, there were twenty-eight mechanics and thirty-two helpers. That number was reduced, as it had been in the process of being reduced. The process of reduction had been going on for some time prior to the execution of the contract, and the completion of the reduction was very shortly after this contract was signed, at the end of 1956, and the final two or three were laid off in early January 1957, and there has been no reduction since then.

Mr. Black: All we will agree to about those things he has stated is that the last lay offs were in January 1957. I don't think it is relevant, but we will stipulate that, to save time.

Mr. Lang: During the eight years of your employment with the company, with Warrior & Gulf Navigation Company, you knew that the company subcontracted its work

out, a considerable portion of its work out, just as it did after your lay off, did you not?

A. There was some, yes, sir.

Q. (Mr. Lang continuing): You know there was the continuous practice of having various ship repair yards in this area do repair and construction work on the equipment?

Mr. Black: We are not complaining of any construction work. They can build the ships anywhere they want to. They are not covered by our contract.

[fol. 64] Judge Thomas: Limit it to repair.

Mr. Lang: During the entire time you worked for Warrior & Gulf Navigation Company, that company continuously had repair work done on its equipment at various ship repair yards in this area?

Mr. Black: Objection. I don't see what that has to do with this particular issue.

Judge Thomas: Overruled.

Mr. Black: Exception.

A. Yes, sir, they did that. Some of the barges we could not handle. They were loaded. They would have to go to dry dock.

Judge Thomas: Mr. Black, if you have other witnesses who are cumulative to Mr. Estes' testimony, could not that be stipulated?

Mr. Black: We have one more who works at Bender's, who will testify to the same thing, and we have—

Mr. Lang: If you will tell me what you seek to prove by this witness I might stipulate that if this witness were [fol. 65] placed on the stand, the witness might so testify, and waive cross examination.

Mr. Black: Mr. Eugene Wilcutt will testify that he worked on Warrior & Gulf Navigation Company barges which were the same barges he had worked on at Warrior & Gulf, while he was working for Bender, and that he did the same type of work at Bender on those barges which he had done at Warrior & Gulf, that he was laid off from the Warrior & Gulf Navigation Company in October 1956, that he worked at the Bender Company and the work was

laid out him by the same foreman who laid out the work fo[illegible] when he was employed at Warrior & Gulf Navigat[illegible]ompany.

Judge Thomas: All right, is that stipulated?

Mr. Lang: I don't know whether the words used by counsel were "laid off by a lack of work". Moreover, the contract is dated—

Judge Thomas: All I am trying to do is to shorten the proceeding. If not, call the witness.

Mr. Lang: The substance of that I would stipulate to. I don't know whether the language used was that to which I referred. I do stipulate that this reduction occurred.

[fol. 66] Mr. Black: I will put it this way. He ceased going to Warrior & Gulf Navigation Company on the aforementioned date and working at said place and obtaining wages therefor, and has not gone to said place and worked for wages since said date.

Mr. Lang: The date, however, appearing on the contract of September 26th is not the date of the execution of the contract in evidence. As I understand, that contract was actually signed November 3rd, 1956.

Mr. Black: The contract on its face says September 26th, 1956. That is the date when it became effective. That is the only relevant date, so far as Your Honor is concerned.

Mr. Lang: I would join in that stipulation with the provision this witness would likewise testify that he has not at any time, at least, prior to August 22nd, participated in any grievance or complaint about his being laid off.

Judge Thomas: That is agreeable, is it not, that he filed no grievance?

Mr. Black: Not at the time he was laid off. He understood he was laid off for lack of work.

[fol. 67] Judge Thomas: He participated in this grievance?

Mr. Black: Yes, sir, he was there at the hearing on this grievance.

Judge Thomas: All right, go ahead.

ROBERT G. LISTER, being first sworn to speak the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. Black:

Q. What is your name, please?
A. Robert G. Lister.
Q. Mr. Lister, where are you employed now?
A. Warrior & Gulf Navigation Company.
Q. How long have you been so employed, sir?
A. Right close to twelve years.
Q. What is your job out there?
A. Mechanic.
Q. As a mechanic, what kind of jobs do you do?
A. Burn, weld, ship fit, work on Diesel engines, pipe fit.
Q. Now, do you recall around September 25th, 1956, do you recall the nature of the work that the company had there in the yard around that date?
A. Yes, sir.
[fol. 68] Q. All right, sir, included among the things that you worked on, were you working on barges at that time?
A. Yes, sir.
Q. What kind of work did you do on barges?
A. Well, if a barge had come in and had a hole in it, we patched it, and, if it were necessary to renew a plate, we renewed it. On one occasion, a barge got damaged in a wreck, and we fixed it altogether, we made a new front end for it and put it on there.
Q. Now, at that time and at the present does the company have facilities for turning over barges?
A. Well, they are working on facilities to turn the barges, but it is not complete.
Q. Now, when you say "turn the barges" what do you mean?
A. Well, I mean, that is, to turn it over, where the bottom, which is ordinarily in water, will be on the top, where you can work on it.
Q. What do you do with the bottom?
A. Take it off and put a new one on.

Q. Has that kind of work been going on at the terminal out there?

A. No, sir, we have not done any of that. I don't remember just exactly when the last one was, but it must have been in 1951 or 1950 since we turned a barge.

Q. Do you still do some work on barges out there?

A. Yes, sir.

Q. Have you done any work on barges in the last couple of months?

A. Yes, sir.

Q. What kind of work have you done?

A. Little repair jobs like holes, maybe rust in them, maybe something like that.

[fol. 69] Q. That kind of work that you have been doing and do this day, is a lot of that also being contracted out by the company?

A. Yes, sir.

Q. To what firms?

A. Bender, Harrison and Mobile Ship Repair, Jackson and Hope.

Q. When you do work on barges like that, who lays that work out for you?

A. Well, see, we have two or three different leadermen out there or foremen and it is whichever one we are working under.

Q. Is one Albert Jones?

A. Yes, sir.

Q. Do you know who goes down to Harrison Brothers to lay out the work for men to do on Warrior & Gulf Navigation Company barges there?

A. Well, it is one of the supervisors in the division whichever one the company see fit to send, either Mr. Jones or Mr. Few or Mr. Johnny Williams.

Q. Now, I will ask you if you know how many supervisors the company had employed around September 25th 1956?

A. How many supervisors?

Q. How many supervisors and foremen?

A. There is Mr. Williams, Mr. Albert Jones, Mr. Walter Few.

Q. Let me ask you this. Have any of the foremen who

were working there at that time been laid off or left since that time?

A. No, sir.

Q. At that time, they were supervising sixty men. At the present time, how many?

A. Six mechanics and twelve or thirteen helpers.

[fol. 70] Q. But you still have the same number of supervisors?

A. Yes, sir.

Q. Has the clerical force been reduced since that date, since September 25th, 1936?

A. I don't know just what you mean.

Q. Have any of the clerks been laid off or are there less than there used to be?

A. Not that I know.

Q. The only employees affected by this contracting out have been the mechanics and the helpers, that right?

A. That is right. May I ask a question?

Judge Thomas: Mr. Black, the witness wants to ask a question.

Witness: I would like to know why we could not continuously do the work out there the same as we send it off to Bender or some of the rest of them.

Mr. Black: We will get down to that.

Q. (Mr. Black continuing): Now, Mr. Lister, are you familiar with the meeting which we had, concerning the grievance which we are suing on here today?

A. Yes, sir.

Q. At that meeting, did you tell Mr. McElroy about some work that had been done by the employees of an independent contractor?

[fol. 71] Mr. Lang: Objection, as incompetent.

Mr. Black: We are going to show that Mr. McElroy stated there were certain kinds of work the company could not contract out.

Judge Thomas: Who is Mr. McElroy?

Mr. Black: Vice President of the Warrior & Gulf Navigation Company.

Judge Thomas: I don't think that is admissible. Sustained.

Mr. Black: Exception.

Mr. Black: Your Honor—

Judge Thomas: What is it you expect to prove?

Mr. Black: We expect to show that as a result of what he said to Mr. McElroy, Mr. McElroy admitted there were many types of work that the company felt they could not contract out. Here they are claiming we cannot arbitrate the question. He is Vice President of the Warrior & Gulf Navigation Company, which is the Defendant in this case.

[fol. 72] Judge Thomas: O. K. Go ahead.

Mr. Lang: Exception.

Mr. Black: Who is Mr. McElroy?

A. Vice President of the Warrior & Gulf Navigation Company.

Q. (Mr. Black continuing): At the meeting we are talking about, did Mr. McElroy speak for the company?

A. Yes, sir.

Q. Would you tell the Judge what you said to Mr. McElroy about some work that had been contracted out at that particular time?

A. Now, I have said so much to Mr. McElroy I would have to know what meeting you are referring to.

Q. I direct your attention to the meeting I attended and to the subject of screws for the foundation. You said among other things—

A. Oh, that was pertaining to the petition we carried to the company for arbitration on this case?

Q. That is correct. Yes, sir, go ahead?

A. It is so much.

Q. That is all right.

A. I cannot remember all of it.

Q. All right, sir. We wil bring that out by another witness then. Mr. Lister, could you tell us how many hours of work, on the average, mechanics have been doing out there at the company, in the past couple of months?

[fol. 73] A. I have been on ten hours a day for the past six weeks.

Q. All six mechanics have been on ten hours a day for the past six weeks?

A. Well, no, there have been some days that all six could not work, because of a hold up in the machine shop.

The machine shop did not get the material out for us to continue.

Q. On the average, have all six been working ten hours a day?

A. On the average, yes, sir.

Q. On the average day, the six could do over eight hours work, is that right?

A. That is right.

Q. Do you know who is next on the company's recall list, seniority recall list?

A. J. L. Daugherty.

Q. Was Mr. J. L. Daugherty an official of the union?

A. Yes, sir, shop steward.

Q. Was he a militant union man?

Mr. Lang: Objection.

Judge Thomas: Sustained.

Mr. Black: Exception.

Mr. Black: We were going to offer to show that only for the purpose of showing this: we are contending when the case is arbitrated, one reason the company has con-
[fol. 74] tracted out this work is to avoid calling Mr. Daugherty back.

Judge Thomas: Didn't you say you were not going into the arbitration?

Mr. Black: Yes, sir.

Cross examination.

Mr. Lang:

Q. You are President of the Union, are you not?

A. Yes, sir.

Q. Do you know what the company's supervisors do when they visit the repair shops to which this work is contracted out?

A. No, sir, I don't know exactly.

Q. You have no first hand knowledge of it?

A. No, sir.

Q. You don't know whether they inspect or whether they carry plans or just what they do over there?

A. No, sir.

Q. During the entire period of twelve years that you have worked for Warrior & Gulf Navigation Company, have you not observed that there has been a continuous practice of subcontracting repair work to outside shops?

A. There has been some, yes.

Q. Continuously throughout those twelve years?

A. Yes, sir.

Q. Do you have any way of knowing how much it has been at various stages?

A. No, sir, I sure would not.

[fol. 75] Q. Do you have any way of knowing whether or not the company has saved money by doing that?

A. No, sir.

Q. Do you have any way of knowing what enters in the judgment in determining whether to subcontract this work or not?

A. No, sir, I sure would not.

Q. Do you have any knowledge to indicate that the company has subcontracted this work out over the years for any reason other than the purpose of efficiency and economy?

A. No, sir.

Judge Thomas: Mr. Lister, I don't know whether you are able to answer this question or not. The work which is now being presently contracted out, were you all equipped to do that work out there at Warrior & Gulf Navigation Company?

A. Yes, sir.

Mr. Lang: One more question: You participated in negotiations on behalf of the Union, when the contracts with this company were negotiated, did you not?

A. Only on the first one.

Q. (Mr. Lang cont.): That was in 1952?

A. 1952, yes, sir.

Q. You were not in the negotiations the last time, in 1956?

A. No, sir.

Q. During the negotiations in 1952, was there not brought up by the Union the subject of limitation of the company's right to subcontract this work out?

[fol. 76] Mr. Black: Objection.

Judge Thomas: This is the 1952 contract?

Mr. Black: Yes, sir.

Judge Thomas: Sustained.

Mr. Lang: Exception.

Judge Thomas: I want to ask this gentleman two questions. Is Mr. Estes on the recall list?

A. Yes, sir.

Judge Thomas: Do you know where?

A. I believe he is the fourth down. I may be wrong.

Judge Thomas: Is Mr. Willcutt on it?

A. If his two years have not expired. I don't know just when he was laid off. He was laid off in 1956, I believe.

Judge Thomas: After they have been gone two years, are they taken off the recall list?

A. Yes, sir.

[fol. 77] Mr. Lang: Mr. Lister, if more than one barge is in need of repair, can it be handled at the yard?

A. Providing that it does not have to go on the dry dock.

Q. (Mr. Lang continuing): If more than one barge is leaking, it cannot be handled at the yard?

A. If you have to dry dock it, to fix the hull.

Q. In other words, the facilities at the yard are quite limited?

A. Yes, sir.

Judge Thomas: How many docks do you have?

A. Just one.

Judge Thomas: Can you handle more than one barge at the time?

A. No, sir.

Mr. Lang: Do you know how many barges the Warrior & Gulf Navigation Company operates?

A. No, sir.

Q. (Mr. Lang continuing): Do you know it is over one hundred?

A. I feel like it is, but I could not say it was or was not, because I don't know.

Q. Can you dock a loaded barge at the Warrior & Gulf Navigation Company?

A. That depends on how much tonnage the barge has in it.

[fol. 78] Re-direct examination.

By Mr. Black:

Q. Mr. Lister, does this grievance concern the contracting out of any work that the company cannot handle at its terminal facilities there? Are we claiming that they cannot contract out work that they cannot do at the terminal?

A. No.

Q. Are we claiming that they cannot send a barge in need of emergency repairs to another place when we are working at the place there?

A. No, sir.

Q. Have we ever complained that they could not contract out work in an emergency or work that we could not do?

A. We never have.

Chaille E. Ward, being first sworn to speak the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. Black:

Q. What is your name, please?

A. Chaille E. Ward.

Q. Where do you live?

A. Citronelle, Alabama.

Q. Were you ever employed by the Warrior & Gulf Navigation Company?

A. Yes, sir.

Q. Whereabouts were you employed by them?

A. At the Chickasaw Terminal.

[fol. 79] Q. What did you do, when you worked for them?

A. Well, I was a mechanic.

Q. As a mechanic, what kind of jobs did you do?

A. Well, I did burning, welding, pipe fitting, carpenter work.

Q. How long did you work for them?

A. From the second day of November, 1948 up until January 1957.

Q. What happened in January 1957?

A. I was terminated.

Q. Laid off or terminated, in any event, you ceased to work there, is that correct?

A. Yes, sir.

Q. Are you still on lay off from the company?

A. Yes, sir.

Q. Have you ever gone back to work for the company since that date?

A. No, sir.

Q. You have signed a grievance which is the basis of this law suit, have you not?

A. Yes, sir.

Q. Have you ever worked for Harrison Brothers?

A. Harrison Brothers Dry Dock?

Q. Yes?

A. Yes, sir.

Q. When did you work for Harrison Brothers Dry Dock, to the best of your recollection?

A. October, November and December 1957.

Q. What did you do at Harrison Brothers Dry Dock?

A. Well, I was a burner, a welder, sir.

Q. Did you work on Warrior & Gulf Navigation Company equipment?

A. Yes, sir.

Q. What kind of equipment did you work on?

[fol. 80] A. On the barges, on the older barges, they removed the wooden hatch covers and replaced them with metal covers.

Q. When you worked for Warrior & Gulf Navigation Company, did you do the same kind of work on the same kind of barges for them?

A. Yes, sir.

Q. When you worked for Warrior and Gulf Navigation Company, did you have anything to do with the installation of some facilities which were placed there, for the purpose of turning over barges, and, if so, tell us what you had to do with those facilities?

A. Well, the only actual part I had to do with it was the location of an electric winch which they used for power for turning the barges over.

Q. Have any barges, to your own knowledge, been turned over out there at the terminal?

A. Yes, sir.

Q. Where was that done? Was it done at a different place, or was it done out there at the terminal?

A. At the terminal.

Q. This winch that you installed, was anything else done there to the harbor, to ready the harbor for the turning over of barges?

A. Yes, when we put that winch out there, Mr. Nichols—

Q. Who is Mr. Nichols?

A. Another foreman out there. He come out there and showed me how he wanted and where he wanted everything, and we had to dig out and make a foundation, and he told me it was their intention to turn over barges over there; outside of that, there was some other work that went on, sir, out there, which was in connection with that, they were going to dredge a slip out to make it deeper, and they also drove two clusters of piling on the far side [fol. 81] of the slip, they called them dead men, for anchoring cables to, to turn the barges.

Q. What was the purpose of turning the barges?

A. To put new bottoms on.

Q. Have you put new bottoms on at Harrison Brothers?

A. No.

Q. Do you know whether Harrison Brothers have ever put new bottoms on them for Warrior & Gulf Navigation Company?

A. No, sir.

Cross examination.

By Mr. Lang:

Q. You filed no grievance after your lay off in January 1957, until the grievance was filed in this case on August 22nd, 1958, is that correct?

A. That was when the actual grievance was signed by me.

Mr. Lang: May I say something that may save some time? We are not contending here, as our answer clearly shows, that we have not done work at the Warrior & Gulf Navigation Company terminal, much of the same character, a great deal of the same kind of work that is being done in these yards where the work has always been subcontracted, just as it is now. In fact, as we will show, when we put on our case, we have engaged in major ship construction in that yard. The question is whether we can do some of the work which we are subcontracting out, or that some of these men can do some of the work which [fol. 82] we are subcontracting out. That is not the question, as we see it. We are not contending that some of the work which we are subcontracting out cannot be done on our yard. If we can save some time in the presentation of counsel's case, we will be glad to stipulate that.

Mr. Black: I am not interested in any stipulation, particularly, the first part of what he has had to say. We want to show this company is contracting out the very work we made this contract about, and some of the very employees that did the work on this contract are at these other places doing the same work for less wages.

Judge Thomas: Go ahead. If we had had a pre-trial of this case, I would have cut it in one-fourth.

Mr. Black: I wish you had.

Judge Thomas: I wish I had, too, but I was not requested to. I didn't know what was in it.

[fol. 83] A. Gus Rodriguez, being first sworn to speak the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. Black:

Q. What is your name, please?
A. A. Gus Rodriguez.
Q. Where do you live?
A. Chickasaw.
Q. What is your job?
A. Staff representative United Steelworkers of America.
Q. In your capacity, as staff representative of United Steelworkers of America, do you deal with the Warrior & Gulf Navigation Company?
A. I do.
Q. Did you handle the grievances which are the basis of this law suit?
A. I did.
Q. Do you have those grievances with you?
A. Yes.
Q. Do those grievances also show the employees who are parties to the grievances?
A. Yes, sir.
Q. Do you have them with you, sir?
A. They are in my brief case over there.
Q. Is this document I am showing you one of these grievances?
A. Yes, sir.

Mr. Black: I would like to offer this grievance report, as Plaintiff Exhibit 1.

[fol. 84] Thereupon, said grievance report was marked Plaintiff Exhibit 1.

Mr. Black: Mr. Rodriguez, do you have the other grievance, which is the subject of this law suit?

A. Yes, sir.
Q. (Mr. Black continuing): I show you a paper, and

I ask you is this the other grievance to which you refer, concerning the subject of contracting out?

A. Yes, sir.

Mr. Black: I would like to offer this grievance report as Plaintiff Exhibit 2.

Thereupon, said grievance report was marked for identification Plaintiff Exhibit 2.

Mr. Lang: May I have a moment, sir, on this?

Judge Thomas: Surely.

Mr. Lang: We object to this document on the ground that it is beyond the scope of the pleadings. The only grievance involved here is the one set forth in Paragraph 3, the grievance filed on August 22nd, 1958.

[fol. 85] Mr. Black: We would like to amend the complaint to put the letter "s" wherever the word "grievance" appears.

Judge Thomas: How many are there?

Mr. Black: Two, filed on the same date and discussed on the same.

Mr. Lang: I don't agree. That grievance bears the date of September 3rd, 1958.

Mr. Black: They were both discussed on the same date.

Mr. Lang: No, unless it was subsequent to or on September 3rd, 1958. The previous grievance was August 22nd, 1958.

Mr. Black: You were not there.

Mr. Lang: They could have been discussed subsequent to August 22nd, 1958, but this one dated September 3rd, 1958, could not have been discussed on August 22nd, 1958, when the first grievance was presented. This relates to something beyond the scope of all the pleadings herein.

[fol. 86] Judge Thomas: Let me see it, please.

Mr. Lang: Yes, sir.

Mr. Black: If Mr. Lang has any doubts about it, he can ask Mr. Rodriguez a couple of questions.

Judge Thomas: Objection sustained. This is matter outside the scope of the pleadings.

Mr. Black: Exception.

Mr. Black: Mr. Rodriguez, subsequent to the date on which you filed the grievance, which is in question here,

did you write the company a letter and add some other parties to the grievance?

A. Yes, sir.

Q. (Mr. Black continuing): Do you have a copy of that document with you?

A. I think you have it.

Q. Is this the letter?

A. Yes, sir.

Mr. Black: I would like to offer this letter dated October 9th, 1958 as Plaintiff Exhibit 3.

[fol. 87] Thereupon, said letter was marked Plaintiff Exhibit 3.

Cross examination.

By Mr. Lang:

Q. Mr. Rodriguez, referring to Plaintiff Exhibits 1 and 3, would you please point out the names of those persons who still have seniority, that is, within the two years, and who are laid off?

A. The signers of the Exhibit were present at the meeting when this grievance was instituted and they all claimed that they had been laid off within the two years period.

Mr. Black: Whatever the company's record shows on that, we will stipulate is correct.

Mr. Lang: All right.

Judge Thomas: Mr. Rodriguez, do you know who was on the preferred list there of those names?

A. I don't know all the names personally.

Judge Thomas: All right, just stipulate on it.

Mr. Lang: Sir, to save time, we will put that in by stipulation later.

[fol. 88] Mr. Black: If Your Honor please, I had one other witness who is at work, and we were going to call him, by the name of Ottie L. Cochran. His testimony would be cumulative. He would testify, if he were here, that he sometimes works an eight hour shift at Warrior & Gulf Navigation Company, and then goes to the Harrison Company where he works another eight hour shift,

where he does the same work under the same foreman as he did at Warrior & Gulf Navigation Company.

Judge Thomas: Is that all right?

Mr. Lang: I am sorry. I didn't hear it.

Mr. Black: The testimony of Ottie L. Cochran, who is at work and whom we were going to call, would be cumulative. He would testify, if he were here, that he sometimes works an eight hour shift at Warrior & Gulf Navigation Company, and then goes to the Harrison Company where he works another eight hour shift, where he does the same work under the same foreman as he did at Warrior & Gulf Navigation Company.

Mr. Lang: We don't object to that, sir.

Judge Thomas: Very well. Call your next witness.

[fol. 89] Mr. Black: Your Honor please, with the stipulation that the contract is in, etc., Plaintiff Rests.

Judge Thomas: All right, call your first witness for the Defendant.

Wallace I. McElroy, being first sworn to speak the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. Lang:

Q. What is your name, please?

A. Wallace I. McElroy.

Q. You are Vice President of Warrior & Gulf Navigation Company?

A. That is right, sir.

Q. How long have you held that position?

A. Since 1954.

Q. Prior to that time, what position did you hold with that company?

A. Superintendent of Operations, Safety Director, Purchasing Agent, Office Manager and stenographer.

Q. The company was first organized in what year?

A. The Warrior & Gulf Navigation Company was organized as a company in 1940 and incorporated in the State of Alabama.

Q. When did you assume the duties of Superintendent of Operations?

A. I am a little hazy on that date, Mr. Lang, but I believe it was about 1949 or 1950.

[fol. 90] Q. Between 1940 and 1949, what did you have to do, with reference to operations, if anything?

A. From 1940 to 1949, I was Clerk and Safety Director in the Terminal Superintendent's office there in Chickasaw.

Q. In the course of preparing for this case, have you examined certain records of the company?

A. I have, sir.

Q. What is the nature of the operations of this company?

A. We are what is known as a contracting water carrier, a carrier by water. We operate under the jurisdiction of the Interstate Commerce Commission. We have allocated rates. We publish a tariff. The scope of our operations is somewhat limited.

Judge Thomas: Does not the statement that you are a contract carrier fully cover it, other than where you operate?

A. Except to add this: that we are in direct competition with all other forms of transportation, with other barge carriers, the railroads, and the over land carriers.

Judge Thomas: I realize that.

A. We compete with them.

Judge Thomas: Where is your operation?

A. On the Warrior—Tombigbee River System between Birmingham and Mobile and the Gulf Intracoastal Water Way from St. Marks, Florida to Brownsville, Texas, also in the Gulf of Mexico, extending from Fort Pierce, Florida to Brownsville, Texas, also in the Mississippi River, [fol. 91] as far North as Memphis.

Mr. Lang: You carry various kinds of cargo?

A. We carry steel products, finished steel products Northbound or marine cargoes, all raw materials used principally in the steel mills or manufacture of steel.

Q. (Mr. Lang continuing): Was the company organized to be a ship repair company?

A. It was not, sir. We are strictly in the transportation business.

Q. Now, describe the history of the ship repair and construction work by your company from its inception in 1940?

A. We have always maintained a small repair force at our Chickasaw operations, to carry on miscellaneous barge repairs. We have considered it economical to do that over the years. At that time in 1940 we depended on the outside ship yards for dry docking services. We have no dry dock. Our facilities were very limited. Later on, when the war came along, the ship yards got over burdened with Government contract work and we were forced to build a sort of make shift dry dock to lift our barges up on one end, to make temporary repairs, whenever we could do so.

Q. This was the beginning of a period when you deviated from the original objective of maintaining a mere skeleton repair force and subcontracting all the rest of the work?

[fol. 92] Mr. Black: Objection on obvious grounds. That is the most leading question I have heard in my life.

Judge Thomas: Sustained.

Mr. Lang: Exception.

Q. (Mr. Lang continuing): Go ahead and describe what changes occurred, if any, in the repair and maintenance work in which you engaged?

A. Well, we depended on the outside yards for dry docking, as I said before, for our vessels. Immediately following the war—let me go back—in 1940, we had, as I recall, about six or eight mechanics.

Q. Suppose we do this, for the purpose of clarity. Can you give us the changes which have occurred in the years from 1946 to date, in the number of mechanics and helpers employed at your terminal at Chickasaw?

A. Yes, sir. I made some notations from the records of the company, in preparation for this. Can I read this?

Q. Would you read that, please? I would like to point out there was a misunderstanding this morning when I asked for the number employed. It was understood by one of the gentlemen at the table that I was referring to the first contract in 1952. In 1952, there were fifty-seven men in the total work force.

[fol. 93] Judge Thomas: You have asked him an all inclusive question.

A. We had in 1946 eight mechanics and an unknown number of helpers. I don't have that figure immediately available. In 1947 we had eleven mechanics and nineteen helpers. In 1948 we had a fluctuating situation there, sixteen to twenty-two mechanics and again I don't have the record of the number of helpers. I can get that from a further study of the records, if it is desired. In 1949 we had fifty-three mechanics and sixteen helpers, and a total of two hundred twenty-three wage earners covered by other union contracts. In 1950 we had thirty-seven mechanics and sixteen helpers, and a total of two hundred ninety-eight wage earners. In 1951 we had forty-seven mechanics and forty-five helpers, and a total of two hundred seventy-nine wage earners. In 1952 we had eighteen mechanics and twenty-nine helpers, for a total of one hundred eighty-two wage earners. In 1953 we had twenty mechanics and thirty-one helpers, two hundred thirty-three total wage earners. In 1954 we had twenty-two mechanics and twenty-eight helpers, two hundred seven total wage earners. In 1955 we had twenty-five mechanics and thirty-two helpers, two hundred sixty total wage earners. In March 1956, we had twenty mechanics, twenty-two helpers, a total of two hundred seven wage earners. In November 1956, we had fifteen mechanics and seventeen helpers, and two hundred seven I assume is correct for the total number of wage earners. January 11th, 1957, we had eleven mechanics and thirteen helpers, two hundred thirty-three wage earners total. Now, Judge, of those eleven remaining on the roll in 1957, two have subsequently retired, three have quit to seek other employment, so as [fol. 94] of 1958 we have six mechanics, seventeen helpers and a total of two hundred thirty-eight wage earners of all classes.

Judge Thomas: Go back to 1946 and give me the wage earners.

A. Eight mechanics. I don't have that figure, Judge.

Judge Thomas: In 1947, what is the number of wage earners?

A. I don't have that.

Judge Thomas: In 1948?

A. I don't have that. In 1949, there were two hundred twenty-three wage earners; in 1950, two hundred ninety-eight; in 1951, two hundred seventy-nine; in 1952, one hundred eighty-two.

Judge Thomas: I have the rest of them.

Mr. Lang: Now, you gave the figures of eleven mechanics and thirteen helpers in January 1957, and six mechanics and seventeen helpers in 1958. That is correct, is it not?

A. That is correct.

Q. (Mr. Lang continuing): The number of helpers increased by four?

A. That is correct.

Q. In referring to the total wage earners, which employees are covered there?

[fol. 95] A. We have our Port Birmingham operations, which includes longshoremen, and we have our unlicensed boat personnel that operate on all our tow boats, and, of course, we figure all of them in that figure.

Q. How about your licensed personnel, your engine and wheel house personnel?

A. The engineers are covered by a contract and are included in those figures. I presume they are covered by the marine engineers international.

Q. How many contracts do you have with labor unions?

A. Five.

Q. How many with the steelworkers, the plaintiff in this case?

A. Three.

Q. Which employees are covered by the steel workers?

A. The Port Birmingham longshoremen or stevedores and the unlicensed boat personnel.

Q. You mean dock hands?

A. Dock hands, oilers, cooks, mess boys and our repair force at Chickasaw.

Q. Dock hands, oilers, cooks, mess boys and your repair force at Chickasaw?

A. Yes, sir, and the other two contracts are with the Marine Engineers International Association, covering the engineers on the vessel and the master, mates and pilots association, covering the wheel house.

Q. All of those employees covered in the five union contracts make up the total figures you have given for total wage earners?

A. That is correct.

[fol. 96] Q. Now, would you please resume your counting of the changes which were made after the close of World War II in your repair operations?

A. I will have to go back, if the Judge will bear with me a minute. At the outbreak of World War II, we had two deep sea old type freighters that we operated in the open Gulf. We had three river tow boats that operated between Mobile and Birmingham. The War Shipping Administration requisitioned the two sea going vessels, which drastically curtailed our operations. In order to serve our customers in Texas, we utilized the inland route known as the Intracoastal Water Way, a new route which had opened up only a few years before. At that time, instead of bringing our loaded barges into Chickasaw and transferring the cargo into the deep sea vessels, we sent these barges through the inland route. The towing between Mobile and Texas was contracted out to outside towing concerns. At the end of the war, the Government returned our two old type ships but, at that time, the cost had increased to such an extent of operating those vessels that we did not consider it economical to attempt to operate them in the short haul service between Mobile and Gulf ports, so we disposed of them, and decision was made to purchase three tugs that had been declared surplus by the War Shipping Administration with which to carry on our towing operations between Mobile and Texas to

replace the two motor ships we lost or we disposed of. Based on our knowledge of the river operation and the knowledge we had gained of the canal operation between Mobile and Texas ports, we realized that the tugs were not the real answer to our problem, so decision was made to borrow a little more money and design a tow boat that would be a combination vessel that would operate success-
[fol. 97] fully both on the river and on the open waters of Mississippi Sound in the waters west of New Orleans. We secured a loan to build those vessels, but, prior to commencing the construction of those three ships, we had a sudden spurt of river business we were offered by shippers of increased freight, and we were faced with the necessity of immediately expanding our facilities in order to meet this increased demand, so we had to do something in a hurry. We bought a second hand used steamer from the Federal Barge Line, the steamer "Dwight Davis", which we brought to Chickasaw and converted from steam to Diesel.

Q. What period are you talking about?

A. This was in 1947 and 1948. Now, I would like to go back one little step. We had to decide whether we were going to build these three vessels ourselves, the combination boats, or whether we would contract them to an outside ship yard. The decision was made that we would contract the construction of the hull to outside shipyards, and this was done.

Mr. Black: We are not claiming the right to do any construction work. We have not claimed that right and do not claim it.

Judge Thomas: I think it is admissible. Go ahead.

Mr. Black: Exception.

A. We decided to expand our own little work force at Chickasaw, to bring the completed hull to Chickasaw and outfit it. At that point,—this was immediately following the war, in 1946, new vessels were unavailable, and we
[fol. 98] had to buy a lot of surplus Government stuff. Those vessels were of a particular design by the President of the company and our marine superintendent, and

we felt that a better job and closer supervision could be made if we outfitted those vessels at Chickasaw, by expanding our little work force to do it. But getting back to the "Dwight Davis", this came in after these plans had been made and decision had been made to step up our crew, so we utilized this crew to convert the "Dwight Davis" to Diesel. We were in need of barge equipment. We bought four used barges from Federal Barge Line and brought them to Chickasaw, where we put new bottoms on, by this capsizing method we had designed. We also had to acquire ten new barges from an outside ship yard. Well, after we completed those three vessels which was—I—will look at this level of employees to tell—in 1951.

Q. As you put these three vessels, one at a time, in service, what was your experience with reference to their operation from the standpoint of maintenance?

A. We found out—we had gone out in them and we found they were not suitable. They were not of a design suitable for that operation, and we began to have a lot of trouble with them.

Q. What effect did that trouble have on the maintenance work in your yard?

A. We had to have a crew of men to start building installations or changing bearings and generally do unusually heavy maintenance work.

Q. With respect to age only, how long had those three combination boats been in service?

A. A period of over two years at that time, the oldest one.

[fol. 99] Q. What further developed, with reference to these boats, on the question of maintenance, repair, and so on?

A. We decided then and there the most economical thing to do was to pull those engines out of the boats and put in a type that had already proven itself in some of our other boats, by changing the engines in those three boats, we could standardize the engines. We got additional engines and brought them in and overhauled those engines there.

Q. Was that a minor or major undertaking?

A. Major.

Q. As those vessels were being re-conditioned, were some kept in operation?

A. We had to build one at a time, in order to maintain the rest of our service.

Q. So the repair work was carried on over a considerable period of time for the three of them?

A. That is correct.

Q. What else occupied this work force in the years which followed up to November or December 1957?

A. We also found it necessary to re-power the two vessels that were twenty some odd years old, so we brought those in and stripped the old twenty year old engines out of them, and put G M engine in there, that we had had so much experience with in the past. In addition to that, following World War II, business on the river continued to increase, and we felt it necessary from time to time to acquire additional barges. Along about that time, decision was made to build another new tow boat, the "Hugh Parker". That was built on a contract basis with an outside ship yard, and brought to our yard at Chickasaw, where close supervision could be had of outfitting it, and that vessel, I believe, was placed in service about 1956. The construction of that vessel was going [fol. 100] on at the same time the re-powering jobs were going on, on the other three vessels.

Q. Was this last construction work complete late in 1956?

A. Yes, sir, it was. The "Hugh Parker" was placed in operation in late 1956.

Q. Do you remember the month?

A. It must have been somewhere around October or November, somewhere in there.

Q. Did you or your company thereupon cease its construction work which had begun in 1947?

A. That is correct.

Q. In addition to this construction and major repair and overhauling that you have described, in the intervening period, did you engage in the construction of facilities other than marine facilities in order to take care of this work?

A. Yes, in increasing the fleet, our expanded fleet, of course, required more facilities in the nature of store room and warehouse and other miscellaneous buildings, and the installation of a new dock. We also made a major change in the rigging in which these barges were hooked together, we installed fixed rigging on one hundred and two of the company's barges.

Q. After all this construction was completed in 1956, was there any further need of the expanded force, the force that had been expanded from 1947, off and on, to the Fall of 1956?

A. No, sir, we had reached the end of our expansion program, and were leveling off to the more or less routine transportation operation.

Q. During all this period which you have described, from 1946-1947 to 1956 and indeed to this date, has [fol. 101] your company done all the repair and maintenance work which has been performed on its equipment?

A. No, sir.

Q. Has there been any time from 1940, when the company was started, to this date, when the company has not continuously subcontracted out various portions of that repair work?

A. We have always depended on these outside ship yards for a large part of our repair operations. We are really dependent on the outside yards and consider them just as essential to our operations as our repair force at Chickasaw, because many times we have to call on them in emergency situations for repair work of all nature.

Q. In the figures you have given, showing the fluctuations in the work force over the years, between 1946 and this date, you show lay offs from time to time, do you not?

A. Yes, sir.

Q. During those period of lay offs, were you continuing this practice of subcontracting this work out?

A. We did. We have never changed our policies from the inception of the company of contracting our work, as we saw fit.

Q. What has been the reason for the subcontracting of this work?

A. It is strictly an economical matter. For one thing, we don't have adequate facilities to take care of all repair work that goes on on a tow boat fleet of our kind. We do have a dry dock, which I failed to state we purchased at the close of the war, a surplus Government dry dock, at which we could dock our small towboats, and we really take care of a lot more repair work of that nature today than we did in the past.

[fol. 102] Q. Was there any reason for the maintenance of this larger force in the period between 1947 and the end of 1956, other than this continuous new construction which you have described?

A. There was absolutely no reason.

Q. Did you, during that period, also engage in repair work of the character which you were subcontracting out?

A. Yes, we did, as the occasion permitted. We had this crew and these jobs didn't run exactly in succession. We had this large force. We used this repair force on work to a great extent as a fill in to keep this force occupied.

Q. Now, you say it was a matter of economy, which has prompted you to subcontract this work out. Has there been any reason other than that, other than economy?

A. I cannot think of any other reason. All of our operations in repair were certainly part of our over all cost and we take a look at this thing from an over all stand point, when we decide whether a job should be done at Chickasaw or whether we can do it more efficiently at some other yard.

Q. Has there been any difference since the Union became the bargaining representative of these particular employees at Chickasaw?

A. No, there has not. In fact, I remember some figures in 1954 when we repaired barges under subcontract with an outside and out of state concern, to the extent of $234,000.00. Subsequent to that, we have let out other work of varied amounts. I can cite you some of the figures. I have jotted down a few.

Q. Will you, please, sir?

A. This is in 1954, of course, the $234,000.00. This does not represent complete figures. All we could do here on [fol. 103] the short notice we had was to refer to records

that were immediately available. We can with a more extensive study improve on these figures considerably. In 1955, there was $33,940 contracted repair work. In 1956, I might say that 1955 amount was paid to four of the yards here in Mobile—in 1956, $37,484.00, in 1957 there was $41,162.00.

Q. Referring to 1956 and 1957, did you have any one contract that occupied a substantial portion of that cost?

A. What year was that?

Q. 1956, first?

A. Yes, I believe as a matter of fact we did have one large contract, included in that figure there, a lump sum that was covering some major job. I don't exactly recall the nature of it.

Q. The total figure in 1957 was how much?

A. $41,162.00.

Q. Was there a major job in that year also?

A. Yes, sir, a large job ran pretty close to $40,000.00, which was converting some canvas covered barges to steel lift off covers.

Q. When you say it is more economical to subcontract this work out, what factors do you take into account in determining that?

A. Certainly, we take our wage scale into consideration. We take the overhead, the use of our facilities, supervision, the time required to do the job, the time required to assemble material and put it on order.

Q. Are you equipped to do every job which you subcontract out in the way of repair?

A. No, sir, we are not.

Q. What are your limitations in that respect?

A. We are equipped only to carry on minor repairs.

[fol. 104] Q. Are you equipped to carry on repairs where several barges need repair at the same time?

A. If those barges require dry docking, we are not. We only have one dock and we can only dock one barge at the time.

Q. What would be the effect on your operations of dry docking and repairing these barges, one at a time?

A. It would completely wreck our capacity to serve our customers. The only way we can use these barges is in

transportation. If they are tied up at the dock, they are not earning any remuneration.

Q. Are you limited with respect to supplies of various kinds, which are carried on hand as a matter of inventory by these subcontracting yards?

A. Yes, we carry very limited amount of spare parts or equipment in the way of plates and rods and things of that sort.

Q. What would be required in the way of equipment for facilities—

Mr. Black: I thought we made it clear we were not claiming work that could not be done at that terminal. We have told them over and over again we are not asking for work that cannot be done at the terminal.

Judge Thomas: Sustained.

Mr. Lang: Exception.

[fol. 105] By Mr. Lang (Continuing):

Q. As a practical matter, suppose that your company were ordered as of this date to perform on your yard, with your own people, including people laid off, who are entitled to recall, instead of subcontracting out work, which you are not equipped to have done on your yard, how would you go about complying with that order?

Mr. Black: Objection. We are not trying to get them to do that.

Judge Thomas: Overruled.

Mr. Black: Exception.

A: Well, frankly, it would, I think, just wreck our operations, sir, to do that work on our yard, all of that work there on that yard. When those barges come in a lot of times we have no notice that those barges are in need of repair, we have to do it on quick notice. I can foresee that every time, if we were bound by such restriction, we would have to enter into arbitration proceedings whether we could do a job at Chickasaw or whether we could not. So many jobs require outside machine shop work, such as framing plates.

By Mr. Lang (Continuing):

Q. Suppose you had the equipment or facilities to perform the work?

A. The work comes sporadically. There is the matter of dispatching the equipment. We would have to call these men and have them stand by every day. In order to fully [fol. 106] protect our operation, we would have to have all these men reporting every morning to see whether we had any work that needed taking care of. We would have to order repair supplies, plate, and stuff of that sort. The job would have to await the arrival of that equipment, and we would have to wait until we could get these fellows on the job, and it would, as I see it, just be no end of trouble.

Q. Suppose you had a job that required just one-half an hour, but you could not perform that work with the force that you had on the yard, because it was busy, but you needed that job done right away, how would you go about complying with the order to call your laid off men?

A. We would have to call the men and pay them, a mechanic would be paid for four hours to do the job, which would be uneconomical.

Q. Do you have jobs like that that you subcontract?

A. Frequently.

Q. Of very short duration?

A. That is right.

Q. Do you deny that some of the work which is done by companies to which you subcontract is similar or the same as work which is done on your yard?

A. They do work that we are capable of doing. There is no question about it.

Q. What other circumstances are there in which these subcontracting yards do the same kind of repair work that you do on your yard?

A. Well, sir, they have a regular crew of men. These yards depend not only on us but on the other barge operators on the river. They have a constant force and standing facilities sitting there waiting for this type of work, so we can dispatch a barge down there and have it [fol. 107] on the water before we can think about it ourselves.

Q. Is it practicable for you to do that much of the work that can be done on a particular barge in your yard, and then dispatch it to the subcontractor to complete the work on that barge?

A. That would be entirely impracticable and uneconomical.

Q. Does that account for some of the work being done by subcontractors that could be done on your yards?

A. Yes.

Q. There has been testimony here that two men from your yard go over to the yard of the subcontractor doing work on your equipment. Do you recall the testimony in that respect?

A. I do.

Q. Are representatives of your company sent over to the yards of subcontractors while work is being done on your equipment?

A. Yes, sir.

Q. Who are those representatives and why are they sent there?

A. One of these men is Mr. Ivan H. Martin, a graduate engineer, who goes down to the yard with the barge, or by the time the barge gets there, he tries to be there, to go over with the job contractor what is to be done, and then, as a matter of fact, he stays there or goes back and inspects the work after it is done. That is the extent of his work. He is down there under our instructions to see that we get a good job and to tell them what work we want done.

Q. Are any other representatives sent by your yard?

[fol. 108] A. They are sent strictly as a matter of inspection. We don't use Mr. Martin exclusively. Sometimes he is tied up on an engineering job. We might get another supervisor who is experienced.

Q. Do any of the representatives of your company go down to the yards of the subcontractors to directly supervise the workmen?

A. They have no such instructions.

Q. Now, are you familiar with the other water carriers operating on the rivers on which you operate?

A. Yes, sir.

Q. How many such navigation companies are there?

A. According to U. S. Engineers' figures available, there are some thirty-four barge operators on the Warrior-Tombigbee System.

Q. Those are different companies?

A. All different companies.

Q. That includes your company?

A. Yes.

Q. How many of those maintain repair yards?

Mr. Black: Objection, as irrelevant.

Judge Thomas: Sustained.

Mr. Lang: Exception.

By Mr. Lang (Continuing):

Q. What is the practice in that industry?

[fol. 109] Mr. Black: Objection, for the same reason.

Judge Thomas: Sustained.

Mr. Lang: Exception.

By Mr. Lang (Continuing):

Q. Do you negotiate the labor contracts with the various unions which have contracts with your company?

A. I do.

Q. This labor contract which is involved in this case here also includes the deck hands on the floating equipment, does it not?

A. No, I believe that is a separate contract.

Q. But it is with this same union?

A. Yes, sir.

Q. The Plaintiff here?

A. That is right.

Q. Now, do you subcontract out any of the towing work done by your company?

Mr. Black: Objection, as irrelevant.

Judge Thomas: Sustained.

Mr. Lang: Exception.

[fol. 110] By Mr. Lang (Continuing):

Q. I believe you said you did negotiate for the company the contracts with the Plaintiff?

A. Yes, sir.

Q. Did you negotiate the first contract with the Plaintiff in the year 1952?

A. Yes.

Q. And the contracts subsequent to that?

A. Yes, sir.

Q. The last one being the one in evidence here?

A. Yes, sir.

Q. During the negotiations of the current contract in the latter part of the year 1956, was any reference made to the impending further reduction in the work force of those maintenance people?

A. Yes, sir, and I so stated to the Union Negotiating Committee, that we were fast approaching the end of our construction program, when we would exhaust the capital funds which we had set aside for that expansion, and we would return to a more or less routine transportation, and we would have to reduce our force.

Q. When was that contract, which is Exhibit A to the complaint in this proceeding, when was that contract actually executed?

A. In November, I cannot recall the date, but it was some months after the effective date of the contract.

Q. You mentioned November. Is that the month in which you actually signed the agreement?

A. I believe it was November.

Q. November 1956?

A. Yes, sir.

Q. But it became effective September 25th, 1956?

A. That is correct. That was the expiration date of the prior agreement.

[fol. 111] Q. That was the expiration date of the prior agreement?

A. Yes, sir.

Q. Now, did you at the time you effected that further reduction in November 1956, refer to your previous statement that it was going to be done?

Mr. Black: Objection.

Judge Thomas: Overruled. You brought it out.

Mr. Black: Exception.

A. Yes, sir, I called these men together on the yard.

By Mr. Lang (Continuing):

Q. The men who were being laid off?

A. I called the entire crew, not only the men who were being laid off. I repeated to them that I had told them in negotiations that we were not able to carry on the large crew that we had on strictly maintenance work, that the construction period was over, that we had to cut back the force to the size that we felt like we could keep occupied.

Q. In those negotiations prior to the execution of this current agreement, what discussion, if any, was there about this practice of subcontracting out work?

A. It was specifically mentioned by the Union Negotiators that we were contracting out work. That was one of the issues under discussion at the negotiations.

Q. Toward what end?

[fol. 112] A. That we were contracting work out that would deprive members of their union of work.

Q. How did the Union make that an issue in the negotiations of the new contract?

A. Well, they brought it out, in the conversations, as one of their demands, in addition to wages and other fringe benefits.

Q. What was that demand they were making for the new contract?

A. They were demanding that we discontinue the practice of letting this work out to contractors and depriving their members of work.

Q. Was that demand granted by the company?

A. No, sir, it was not. I went to great length to explain to them very much of what I have said here on the stand, that we had reached the end of our rope, as far as the construction program was concerned.

Q. Do any of the company's contracts with any of the five labor unions contain any provisions limiting the company's right to subcontract work?

A. They do not.

Q. Has the company ever had a contract with any labor union limiting that right?

A. It has not, sir.

Q. Has the Plaintiff Union in years prior to 1956 attempted to obtain the same limitation in its contracts?

A. It was brought up in the negotiations in 1952. I want to go back and correct a wrong impression I may have given. In 1952, I don't believe I was Vice President. Mr. Guthens was Vice President and directly in charge of negotiations, but I was present at the negotiations and participated in them. I do know this was an issue at that time.

[fol. 113] Q. Now, has the company laid off any maintenance men, any of the men we are talking about in this proceeding, since January 11th, 1957?

A. No, sir, we have not. As a matter of fact, we have added to our helper force from thirteen to seventeen men.

Q. What is the net number of mechanics and helpers laid off by the company since November of 1956, considering the retirement of two and the resignation of three mechanics?

Mr. Black: I don't believe there has been any evidence of the retirement of two and the resignation of three.

Judge Thomas: That was testified to. Overruled.

Mr. Black: Exception.

Judge Thomas: I don't know about the three. I know there was testimony about the retirement of two. There was some testimony about some quitting.

Mr. Lang: I think the net number would be competent. Do you have that net number? In other words, the difference in the net of laid off mechanics and helpers, since January 1956?

A. Four mechanics and one helper is the net result.

[fol. 114] By Mr. Lang (Continuing):

Q. The net result of the reduction in force?

A. Yes, sir.

Q. Now, is the net reduction of four mechanics and one helper attributed in any way, or can it be attributed in any way to the subcontracting out of this work to outside repair yards?

Mr. Black: Objection. That invades the province of the Court.

Judge Thomas: Overruled.
Mr. Black: Exception.

A. No.

Mr. Lang: Have you stepped up the subcontracting of this work to outside repair yards for the purpose of discriminating against the Plaintiff Union or its members?
Mr. Black: Same objection.
Judge Thomas: Overruled.
Mr. Black: Exception.

A. No, sir.

Mr. Lang: Or for any purpose other than consideration of economy, efficiency and expediency?
[fol. 115] Mr. Black: Objection.
Judge Thomas: Overruled.
Mr. Black: Exception.

A. No, sir.

Mr. Lang: Between November 1956, when the first reduction in this work force was effected, following the exception of this current agreement, and August 22nd, 1958, was any grievance presented to the company, complaining that the company did not have the right to subcontract out work, or to reduce the work force?

A. No, sir.

By Mr. Lang (Continuing):

Q. Was any demand of any kind made upon the company during that period between November 1956 and August 22nd, 1958, to take that matter to arbitration?
A. No, sir.
Q. Was any suggestion made during that entire period that the company was violating the contract, in subcontracting out this work and reducing that work force?
A. No, sir. May I make one observation?

Mr. Lang: Please do.

[fol. 116] A. With all those fluctuations in employment from 1947 through 1957, I would like to point out we still

have practically the same sized force as when we originally started this construction program. There has been no change. As a matter of fact we have stepped up our employment in another classification, which are the tow boat crews.

By Mr. Lang (Continuing):

Q. All of those are union members?

A. All of those are union members. There has been a net gain in the number of union employed people in our company.

Q. Reference has been made to the fact that no foremen have been laid off since the Fall of 1956, despite the reduction of the number of employees under them. Can you account for that?

A. Yes, sir, I can. Our master mechanic, Mr. Nichols, has reached retirement age and will be retired as of the first of January. Our port engineer, who has also reached the age of sixty-five, will be retired in the coming year. We anticipated that. Now, these supervisors that they referred to, are not only engaged in supervising this small repair force on the yard. They are engaged in the supervision of the tow boat crews. We frequently have to send our port engineer up the river to make the inspection and see that these engine room crews are carrying on their duties. Then, too, the deck crews are engaged in maintenance work and come under the supervision of these men.

Q. There has been no diminution in the amount of work for these foremen?

A. To the contrary, there has been an increase. We have a greater number of employees today.

[fol. 117] Judge Thomas: What is the net result in the layoff of mechanics and helpers since September 25th, 1956? Is it the same as since November 1956?

A. Five additional, Your Honor, which would mean a total of nine.

Judge Thomas: You testified that four mechanics and one helper is the net result of the layoffs since November 1956?

A. Yes, sir.

By Judge Thomas (Continuing):

Q. Is that figure true since September 25th, 1956?

A. Since September, yes. It is true up to date, if I get your question correctly.

Q. The contract is dated September 25th, 1956. It was executed in November 1956. You have testified the net result of layoffs since November 1956 were four mechanics and one helper. Is that true since September 25th, 1956?

A. No, sir, this latest reduction took place, as I recall, in November, but shortly after the signing of this agreement.

Judge Thomas: I don't follow you.

A. We signed that agreement in November, I believe, if I recall correctly. Well, it was in November that we made an additional layoff.

Judge Thomas: Well then, since September 25th, 1956, the net result of layoffs is four mechanics and one helper, is that right?

A. I think so.

[fol. 118] Mr. Lang: May it please the Court, I believe I can get the witness straightened out. What the Judge wants to know is this: Is there any difference in the net result between the people who have been laid off from the date the contract was signed in November, and the date it was back dated in September, September 25th, 1956?

A. No, the net result is still four.

By Mr. Lang (Continuing):

Q. You testified that in November 1956, you had fifteen mechanics and seventeen helpers?

A. Yes, sir.

Q. In March 1956, you had twenty mechanics and twenty-two helpers?

A. That is correct.

Q. That was correct?

A. Yes, sir.

Q. So that subsequent to the signing of the contract in

September, you reduced each category by five, to fifteen mechanics and seventeen helpers?

A. That is correct.

Q. So that there were five mechanics fewer and five helpers fewer after the signing of the contract, through the month of November?

A. That is right.

Q. Then, there were four more mechanics fewer with the eleven to which the force was reduced on January 11th, that is the total of nine fewer after September 25th, is it not?

A. You are right. That is the figure I had in mind a while ago, nine.

Q. That figure of nine was reduced by five, with those quitting and retiring?

[fol. 119] A. That is correct, sir, leaving four.

Q. Leaving a net of four. Now, on the helper side, you reduced the number from twenty-two in March to seventeen in November. There were five less after the contract was signed?

A. That is correct.

Q. You have seventeen helpers today, an increase from thirteen in January of 1957?

A. That is right, sir.

Q. So, you have five fewer helpers today than you had when the contract was signed on September 25th do you not?

A. That is correct.

Q. So you have four mechanics and five helpers fewer than you had on September 25th, 1956?

A. Yes, sir.

Judge Thomas: Among the mechanics, two retired and three quit?

A. Yes, sir.

Judge Thomas: What happened to your helpers, do you recall?

A. That was a reduction in force.

Judge Thomas: Then, actually, the reduction is four mechanics and five helpers, is that right?

A. Yes, sir.

[fol. 120] Cross-examination.

By Mr. Black:

Q. Mr. McElroy, I understood you to say that there had been a net layoff of four mechanics, is that correct?

A. That is correct.

Q. I believe you testified that two men had retired and three had quit, is that correct?

A. That is correct.

Q. You deducted that figure of five from the figure nine you had, is that correct?

A. Yes, sir.

Q. So you said there were four men net layoff?

A. That is the net result.

Q. Will you tell the Judge what five men you got to replace the men who quit or retired?

A. Sir?

Q. Did you recall anybody to take the place of any of those men?

A. No, sir.

Q. The nine men that were laid off originally are still laid off?

A. Yes, sir, but the net result is still five.

Q. The net result to those nine men and their wives and families is they are out of work?

A. I don't know their status.

Q. The net result, so far as their working for Warrior & Gulf Navigation Company is concerned, is that they don't work there?

A. That is right.

Q. These retirements didn't affect that vital thing, sir, one little bit?

A. It affected the net result.

[fol. 121] Q. Did any of the nine men get called back?

A. No, sir.

Q. The nine men are still laid off, are they not, sir?

A. They are.

Q. All right. Now, Mr. McElroy, you stated another thing. You stated that you sometimes had little jobs of one-half an hour, where if you called a man in to work

you had to pay him for four hours, so, therefore, the cheapest thing was to send the job to somebody else to do the one-half hour's work, is that correct?

A. I think that has happened in the past. I don't know all these little instances.

Q. I understood if to be your testimony that sometimes you had instances where the repair jobs would only take one-half an hour and if you were to do the work at your place you would have to pay the men for four hours work?

A. The question was put to me if I had a half hour job what would I do.

Q. Do you have any one-half hour jobs?

A. Specifically, I could not answer that question, but I assume we had many, many such jobs.

Q. You assume that if you had to call a man in you would have to pay him for four hours?

A. According to the terms of the contract.

Q. Therefore, it would be cheaper to get someone else to do the job?

A. In many cases.

Q. How many hours would it take that barge to go from your place down to Harrison's?

A. I would say approximately forty-five minutes to an hour.

Q. You have three men on that barge, do you not, while taking it down to Harrison's?

[fol. 122] A. You are assuming that barge is at Chickasaw. You misunderstand; these barges come in from Birmingham on the river. If we had a barge that was damaged, we would drop it off at Harrison's inbound. We would not bring it to Chickasaw.

Q. Assuming that was at Chickasaw and was going in the direction away from Harrison's past Chickasaw, in that direction, how long would it take to get from there to Harrison's?

A. Forty-five minutes.

Q. You would have to have three men on the barge?

A. Let me make this clear.

Q. Just answer my question, please?

A. That barge is towed from Chickasaw down the river to the ore loading terminal, where it is loaded, and if it

was moved to Harrison's, it would have completed part of that trip, so it would shorten the distance required, so the net result would be no extra expense.

Q. Assume that the barge came past Chickasaw and took forty-five minutes to get there, would you have three men on the barge?

A. No, sir.

Q. Would you have three men involved in that operation?

A. Three on our tug.

Q. You would have to pay all three of them for forty-five minutes?

A. That is correct.

Q. You would have to pay them a substantial amount of money?

A. The wages called for.

[fol. 123] Q. Just going down there, alone would take more money in wages than it would to call the one mechanic and pay him for four hours?

A. I would not say that. There are too many variable factors involved. That tug does not leave Chickasaw with just one barge. It leaves sometimes with four or five barges. You are asking me to describe a situation that we—

Q. We will leave that subject. You don't seem to want to answer that question.

Judge Thomas: I think he has answered the question. You may not like the answer, but he has answered it.

Mr. Black: I have no objection to the answer. The answer was fine. It was not complete.

Judge Thomas: Go ahead. Proceed.

Mr. Black: I am sorry if I gave offense to the Court.

Judge Thomas: Go ahead.

Mr. Black: Mr. McElroy, the document, which was brought into the negotiations in 1956 by the steelworkers and from which the proposal you testified about was made, was this document I am showing you here, is it not, sir?

A. No, sir. This document was never submitted to me in any negotiations.

[fol. 124] By Mr. Black (Continuing):

Q. All right, sir. I will ask you if this was a proposal made to you concerning contracting out?

A. The contracting out?

Q. The contracting out of work only by local mutual agreement?

Judge Thomas: Do I understand you correctly that this was the original proposal made by the Union?

Mr. Black: The original proposal made by the Union to all United States Steel Companies and their subsidiaries, yes, sir.

Judge Thomas: It was?

Mr. Black: The same proposal made to the Wage Stabilization Board that I referred to earlier?

Judge Thomas: It was the proposal in the contract in question here?

Mr. Black: Yes, sir. Is that the proposal that was made to you?

A. This proposal you have in your hand was never made to me, no, sir.

By Mr. Black (Continuing):

Q. That proposal was never made to you?

A. You are speaking of the one you showed me?

Q. Yes, sir?

[fol. 125] A. No, sir.

Q. Well, was this proposal made to you, were these words said to you in the form of a proposal? Contracting out of work only by local mutual agreement, were these words presented to you in writing or in words at the 1956 negotiations?

A. I don't recall that those specific words were read or said at the negotiations. I do recall that the issue of contracting out work was brought up. I don't recall that it had anything to do with any mutual agreement. I think that the request was that the company quit contracting out work period.

Q. Mr. McElroy, do you have an assistant by the name of Mr. Fulmer?

A. Yes, sir.

Q. Do you recall in May 1958 a committee of the Union calling upon Mr. Fulmer and complaining about the contracting out practice of the company now that those men were laid off?

A. I don't recall. What date was that?

Q. In May 1958, sir?

A. I don't recall any such meeting. If it was held, it was not reported to me.

Q. In the year 1957, did the company dredge out a new slip at the Chickasaw terminal?

A. In 1956?

Q. In 1957, sir?

A. In 1957, no, sir, we had no new dredging slips in our place since the company was organized in 1940. We have done some maintenance dredging, to keep those slips deep enough for our boats to come in and out.

Q. Do you recall when the electric winch was installed?

A. I know one was installed.

[fol. 126] Q. When?

A. I don't recall the date.

Q. Your best estimate, please, sir?

A. That winch was installed possibly a year or a year and a half or two years ago.

Q. What was the purpose of installing it?

A. We bought that winch because it was available as a piece of surplus equipment, with the thought that if we ever got back into this business of turning barges again at our Chickasaw terminal, it would be a good piece of equipment.

Q. You bought the piece of surplus equipment and installed it?

A. It is not installed. It is set up in concrete. The motor is not on it and neither is the electric power.

Q. It will take about a day to put that on?

A. I am not engineer enough to answer that.

Q. It will not take in excess of a day?

A. I don't know.

Q. Simultaneously with the installation of that winch, did you install two pilings?

A. Yes, sir.

Q. What was the purpose of installing those pilings?

A. Sir?

Q. Those pilings were also to be used in the contemplated barge turning operations, were they not?

A. Here is what happened. During the time we were having some mooring installations at our terminal, he had his pile driving equipment up there, and, while he was there, we utilized some second hand H. beams, while he was up there and had all his equipment on the job, it was an opportune time to let him shift over to the other [fol. 127] side of the slip and drive these two piling, again with the thought that one of these days we might want to turn a barge.

Q. Simultaneously with the installation of those pilings, did you also dig out the water in between the winch and the pilings underneath?

A. No, sir, not simultaneously.

Q. All right, about that time, did you also dig out underneath the water at that particular point?

A. No, that was one of the jobs involved in installing a new dock out there. If these fellows will recall, we bought a concrete barge from the City of Kansas City, and we moved it to Chickasaw, and we took the warehouse or building apart off the barge and rebuilt it there as a warehouse building or storage building, then we used the concrete barge to sit up on piling to provide extra mooring space for barges, to provide a dock on which we could paint our barges. At that time, we employed the services of a dredge to dredge out on both sides of that dock, and also dredge out our slip. We re-located our dry dock from the south end of the slip to the north end of the slip. We were going to reserve the south end of the slip for nothing but tow boats to come in and re-fuel and for their miscellaneous voyage repairs, and reserve the north end of the slip for the dry dock. We had to dredge the north side of the slip, in order to have water to raise and dock the boats.

Q. Is that dry dock there now?

A. Yes, sir.

Q. On the north side?

A. Yes, sir.

Q. What do you have on the south side?

A. We have our tow boats.

Q. That is the side where the winch is?

A. That is correct.

[fol. 128] Q. That is the side where the pilings for the barge turnings operations are?

A. That is true.

Q. It is true, as I asked you in the beginning, that that side has also been dug out underneath the water, for the purpose of turning barges?

A. That is exactly where we would turn a barge.

Q. That is the purpose of those three things, the pilings, the winch and the digging out underneath the water?

A. The digging out was simply a maintenance item. We have done that before and will do it again. Those slips fill up.

Q. You did do it at the time you put the winch up and the pilings in?

A. Somewhere along there, yes, sir.

Q. Mr. McElroy, when you were giving your figures, sir, for the contract repair work done in the various years, I notice that you left out 1958. Do you have those figures with you?

A. No, sir, I don't. I can give them, I think from memory. They would run about $48,000.00 . . . through September.

Q. That is substantially in excess of the contract repair work that you had done in the other years which you already referred to, which you reported on?

A. In the figures I reported, I believe I prefaced this by saying this was not our complete record. I would be glad to submit to the Court a more accurate figure. This was stuff I could get my hands on immediately. Our records are all stored.

Q. By September of this year, you had already done in excess of more than $10,000.00 more repair work than you had done in any year before?

[fol. 129] A. No, in 1954, if you recall my figures, we contracted out $234,000.00.

Q. You put the new bottoms on barges?

A. That and other miscellaneous items.

Q. From 1955 on, you never had any contract repair work such as we are talking about here now?

A. We had some in 1955. I think the figures speak for themselves.

Judge Thomas: What year was the $234,000.00?

A. 1954.

Judge Thomas: What did that consist of, a big job, little jobs, or what?

A. The bottoms of these barges usually last twelve to sixteen years, then you have to bring them in, and either put the barge on dry dock and install a new bottom, if the deterioration on the barge is too much, or you may repair the barge by a replacement.

Judge Thomas: What did the repair work consist of?

A. Replacing the bottom.

By Judge Thomas (Continuing):

Q. How many barges did you replace the bottoms, roughly?

A. That was either fifteen or eighteen barges.

Q. Was that the larger portion of the $234,000.00?

A. Yes, sir.

Q. Do you recall what it ran per barge, roughly?

A. I believe it is in the neighborhood of $15,000.00. That [fol. 130] is counting the material, labor and all.

Q. You testified in recent years—I remember one year particularly, I don't remember the date, the figure was $41,000.00. You said $40,000.00 of that was one job. What was that job?

A. That was a series of barges. I don't recall the exact number. It was an old type barge, equipped with canvas tarpaulin and wooden hatch boards, built in 1928, and we had an opportunity to acquire some steel covers from another company,—it was merely a matter of converting, ripping all of the old barge wooden hatch covers and tarpaulin, and installing these steel covers with a metal lift off.

Q. That would not require dry docking?

A. No, sir.

Mr. Black: Mr. McElroy, for the major job, where did you have that 1954 work done?

A. A portion of that work was done in Orange, Texas.

By Mr. Black (Continuing):

Q. Where was the rest of it done?

A. I think one barge was done in Mobile.

Q. All the rest was done in Texas?

A. Yes, sir.

Q. This Union does not represent any of your employees in Texas?

A. We have no employees in Texas.

Q. Did the Union ever request you to make any comparison of the relative expense of doing the work on the contracted out basis and doing it there at the yard?

[fol. 131] A. We are constantly making such comparisons, to determine which is the most economical way of doing it.

Q. Did the Union ever ask you to make such a study, let's say, of turning over a barge?

A. No, sir.

Q. Do you know what a rake job is?

A. Yes, sir.

Q. Did they ever ask you to make such a study with reference to a rake job?

A. No, sir.

Q. With reference to any job?

A. No, sir, not that I recall. There has been, I believe, your claim that at one of those meetings we have had recently somebody had been keeping time on a job putting a new floor in a barge. I don't know but I guess their object was to try to determine whether or not we were doing the job cheaper at Chickasaw than we could do a similar job at a shipyard.

Q. At that meeting you are speaking of, do you remember Mr. Cloud being there?

A. Yes, sir.

Q. Do you remember he asked you a number of times whether some of the work could be done cheaper at the Chickasaw terminal than contracting it out?

A. Yes, I believe he did.

Q. He asked you a number of times, didn't he?

A. I don't know how many times.

Q. Do you remember Mr. Rodriguez asked you if any of these jobs saved you anything, with respect to costs, by contracting the jobs out?

A. He may have, I don't know.

Q. A number of people asked you if you saved any money by contracting this work out?

A. That is right.

[fol. 132] Q. You never did say you saved a penny by contracting this work out, although you were asked a number of times by myself and a lot of other people, you refused to make that statement?

A. As I recall, I made the exact statement that all of our repair work is based on an economical situation, and I think a discussion followed as to what the definition of economical was. That is the answer I gave, strictly and purely a matter of economy.

Q. I believe you said "we combined our costs", were not those the words which you used?

A. I don't recall that.

Q. You never did say you saved a dime by contracting out work, although you got every opportunity to say so?

A. I can ask you, Mr. Black, what does the word "economy" mean. Certainly we saved money. We saved hundreds of thousands of dollars.

Q. All right. If you saved hundreds of thousands of dollars, will you tell this Court how much it would cost you, sir, to turn over one barge at your Chickasaw terminal, and put a new bottom on that barge at your Chickasaw terminal, would you tell the Judge what the total cost would be, as compared to doing the same thing at Harrison's?

A. I have no way of knowing.

Q. Can you give the Judge one specific instance of one specific operation where you saved money by shifting the work from your Chickasaw terminal to another place? Can you give us any facts other than your general statement?

A. No, sir, I have no facts of that sort I can give you. I can get them.

Q. You don't have them here today though, do you?
[fol. 133] A. No, sir.

Q. Now, at other times when you have been contracting out work, since the Union has come in, other than here recently, that is repair work or patching up bottoms, etc., at other times when you have had that kind of work and have contracted out that kind of work, there have been no employees laid off?

A. Yes, sir.

Q. Tell us when a number of employees were laid off, when you contracted that kind of work out give us the month and date?

A. I can tell you that every year since 1946 we have contracted out innumerable jobs and people have been laid off, and in 1947 each time our force fluctuated, and in 1954 when we contracted out the work on the bottoms of fifteen or eighteen barges—I forget the number—we only had twenty-two mechanics employed at Chickasaw at that time, whereas in 1951 we had forty-seven.

Q. I want to know which mechanics you laid off just prior to shifting that job out?

A. You mean by name?

Q. Yes, sir, if you know?

A. I have no idea.

Q. Tell us how many mechanics you laid off and when you laid them off?

A. I can repeat this list of statistics that I have gotten.

Q. What year are you talking about?

A. 1954.

Q. In 1952 you had eighteen mechanics?

A. That is correct.

Q. In 1954 you had twenty-two mechanics?

A. That is correct.

[fol. 134] Q. You tell the Court when you contracted out the big job in 1954, you laid off employees, despite the fact that you had increased from eighteen to twenty-two mechanics from 1952 to 1954, is that correct?

A. Yes, and if you go back a little further you will find that we had fifty-three in 1949.

Q. You had no labor contract at that time?

A. No, not in 1949, not with your union, we had other contracts.

Q. For those particular employees?

A. Not for this particular group, no.

Q. So you didn't have anybody laid off then, you didn't have any policy of laying off workers and allowing them to lose their seniority in 1949, did you?

A. Yes, sir, we have always adhered long before the Union came into the picture to the strict two year seniority system. That was not something new. We had that from the beginning of our operation.

Q. It is fair to say that those employees laid off in 1949 had lost their two years seniority by 1954?

A. That is possible, yes, sir, if their two years had expired.

Q. There are more than two years between 1949 and 1954?

A. Yes. We had fifty-three people in 1949. In 1950, we had thirty-seven. I can show you where we contracted work in 1950, with the lay off of some twenty men.

Q. You had no union contract then, did you?

A. Not with this group. I had other union contracts with other employees.

Q. But you say you had men on lay off?

A. Yes, sir.

Q. You nevertheless contracted out work?

A. Yes, sir.

[fol. 135] Q. Tell the Court what kind of work and to whom you contracted it out?

A. The same type of work performed at our yard, the same type we are discussing here, repairing bottoms of barges, conversion jobs from wooden hatch covers to steel lift off covers, etc.

Q. Now, if you will tell us when you have contracted out that work after the Union has come in, when employees were laid off?

A. You mean when the Union employees were laid off?

Q. Yes?

A. Certainly, in 1956, we had contracted out work when five people were laid off, five Union people; twenty-five in

1955; we had twenty in 1956, in March; during that period we were still contracting out this work.

Q. You had twenty in 1956?

A. Yes, sir, March 1956, we had twenty, people, yes, sir.

Q. You laid off some employees then you say?

A. Yes, in November 1956, we laid off five.

Q. Those employees you laid off in November 1956 are the employees among others who are concerned with this grievance, are they not?

A. I assume they are.

Q. Other than these employees who have filed this grievance, have you ever contracted out this work we are complaining about when you laid off men prior to that time?

A. Yes, sir.

Q. In 1952?

A. Yes, sir.

Q. When other than then?

[fol. 136] A. Every year since 1952 we have been contracting out this type of work.

Q. What I want to know if you will tell me: In 1952, you had eighteen mechanics?

A. That is right.

Q. In March 1954, sir, you had twenty-two mechanics. Now, what I am trying to find out is how you figure anybody was laid off during that period when you were contracting this work out. As I see it, you increased your staff rather than decreased it.

A. In 1952 we had eighteen mechanics.

Q. That is right.

A. During the year 1952, we also contracted out a lot of our repair work, as has always been done, and we have never changed our policy before and after the Union came into the picture of giving out this type of work, that we felt was the most economical thing to do for the company.

Q. If you were not contracting out all the work you can do at your Chickasaw terminal, how many employees would you have to call back?

A. I could not answer that question. I don't know the extent of what those repairs are going to be.

Q. Just the repairs that you have under way right now in various yards, if that work were done by the bargaining unit people at your place of work?

A. I understand we could not call back this crew on a permanent basis.

Q. Has anyone asked you to call them back on a permanent basis?

A. If we tried to do all that work out there, we would have to have all these fellows down there, where we could get our hands on them from day to day. They would have to report in. I told those fellows when we reduced the force [fol. 137] we were going to get this down to the point where we could give regular work to the people we now have. We have learned from sad experience—you will notice from the fluctuation in the number of employees—it is costly to keep laying off people and calling people back. It is unwieldy.

Q. You have work for these people if you call them back, don't you?

A. We could possibly find jobs sporadically.

Q. How many of them could you find jobs for?

A. I could not answer that without a thorough study.

Q. Your best estimate?

A. I would not attempt to estimate it. Sometimes we might need fifty men down there. Let me make this statement. During low order seasons, occasionally we will ground a series of barges—we have had as many as five or six barges at one time—we would have to call in a devil of a gang.

Q. From all that talk, it all boils down to this: There are men who are signatories to the grievance in question who are laid off, who would not be laid off, if you were not contracting out a certain amount of your repair and maintenance work on your equipment?

A. I would not say that. They would be laid off for temporary periods between jobs. It would be a hit and miss proposition, as I said, to bring them down and let them report to see if we had a job. We might work them today and not again for a week.

Q. Did you ever know of them objecting to doing that?

A. No, sir, but we object.

Q. Would that restore their seniority rights, if you called them back for one day.

A. Yes, sir.

[fol. 138] Q. Does that have anything to do with your decision?

A. I testified here at this trial from an economic standpoint.

Q. I ask you this question: Is it fair to say that if you were not contracting out this work that you are contracting out now, that some of these men would be able to come back for at least one day's work?

A. Yes.

Q. That would re-instate their seniority rights or keep their two year period from passing? Would it not?

A. I suppose you are right, according to the terms of the contract.

Q. So the contracting out practice that you are engaging in now, it is fair to say, is causing at least some of those people the jeopardy of losing their seniority rights as employees of Warrior & Gulf Navigation Company?

A. Apparently, that is true.

Redirect examination.

By Mr. Lang:

Q. Referring to the figures you gave on the fluctuating employment, you had a contract with the Union in 1955 and throughout the year 1956, did you not?

A. Yes, sir.

Q. In 1955, you had fifty-five mechanics and thirty-two helpers?

A. I believe that figure was twenty-five mechanics and thirty-two helpers.

Q. In March 1956, you reduced the number of mechanics by five and the number of helpers by ten?

A. That is correct.

[fol. 139] Q. Were you subcontracting repair work out while that reduction was made?

A. Yes, sir.

Q. With reference to the question you were asked about

possibly providing an occasional day's work to laid off employees, you said the company objects to that. On what basis would the company object to doing that?

A. It would increase our cost of doing this work when you have a fluctuating force.

Mr. Black: Objection, on the ground he didn't know any facts about the subject of cost.

Judge Thomas: I think it is all repetition. I think you have gone into it.

Mr. Lang: Exception.

Mr. Lang: One more question: What about the matter of time, in seeking out and recalling laid off employees, for that sporadic work? Does that enter into it?

A. Certainly.

By Mr. Lang (Continuing):

Q. In what respect?

A. Time is the essence in any transportation business such as ours. Looking up those laid off people for a small job would consume time, and, not only that, we have to go through the purchasing department and set up an order for [fol. 140] material and get it on hand, whereas these other shipyards are all ready to do that work on a moment's notice.

Mr. Lang: That is all we have, sir. We Rest.

Judge Thomas: Any rebuttal?

Mr. Black: Yes, sir.

A. Gus Rodriguez, being recalled, testified as follows:

Direct examination.

By Mr. Black:

Q. You are the same Mr. Rodriguez who testified here earlier?

A. Yes, sir.

Q. You heard Mr. McElroy testify that the Union proposed something with reference to contracting out at the

negotiations leading up to the contract, which is the basis of this suit, did you not?

A. That is right.

Q. Do you know what proposal was made to the company, with reference to contracting out?

A. Well, as representative of the United Steel workers, we generally get the proposals that are made by the Wage and Policy Committee to be proposed to the various companies, where we are to represent the employees. Now, we take these proposals—

[fol. 141] Judge Thomas: Let's get down to the question. What happened in this instance?

A. Well, we take the proposals of the United Steelworkers and propose to the company, in trying to protect these employees, that we try to limit this contracting out of work to the extent that we mutually agree on contracting out.

Mr. Black: Was that the general proposal made by the United Steel Workers to the United States Steel Corporation and to all other major steel companies?

A. Yes, sir.

By Mr. Black (Continuing):

Q. Now, did you or anyone else on the Union side ever agree with the company that the company had an unrestricted right to contract out work?

A. Never.

Q. Did you, on the other hand, Mr. Rodriguez, ever claim that the contract restricted the company from contracting out emergency repair work?

A. No, we have not.

Q. Did you ever claim that the contract restricted the company from contracting out work that could not be done at the Chickasaw terminal?

A. Never.

Q. Did the Union ever agree with the company that the company had an unrestricted management right to contract out any repair work?

A. Never.

Q. Did you ever give the company any reason to believe that was so?

A. No, sir.

[fol. 142] Q. Since this contract was entered into in 1956, has the Union complained of the company's practice, with reference to contracting out?

A. Yes, the Union has complained.

Q. Did that start soon after the men were laid off?

Mr. Lang: Objection, as leading.

Mr. Black: Tell us when that started!

Judge Thomas: When did it start?

A. Well, after the 1956 agreement, and subsequent months, a couple of months later some of our fellows were laid off, allegedly for lack of work. Now, I have to be in and out of town quite a bit. It was not until some months later that it was brought to my attention that the Warrior & Gulf Navigation Company was subcontracting some of the work that had been originally done at their yard to some outside companies, and it was reported to me, and I instructed the Committee to go in and talk to management about it, to see if they would not stop the practice.

Q. Did you do that as soon as you learned of the practice?

A. As soon as I found out these people were contracting out work that had been originally being performed by our employees at Warrior & Gulf, in May 1958, there was a special meeting held and there was a committee meeting with Warrior & Gulf Navigation Company, in which the [fol. 143] Committee talked this matter over with Mr. Fulmer, and resolutions of that meeting are recorded in our minute book. The report that was given back to me was that Mr. Fulmer had stated to the Committee that they had entered into a contract with Harrison Brothers to convert some hatch covers on some barges. Now, they claimed that they had entered into this contract prior to the time that those people were laid off, and they didn't want to break that contract and get into trouble with Harrison Brothers. They reported to me that Mr. Fulmer led them to believe—

Mr. Lang: Objection, as hearsay.
Judge Thomas: Sustained.
Mr. Black: Exception.

By Mr. Black (Continuing):

Q. As a result of that conference, did the men come back and report to you?
A. Yes.
Q. As a result of your conversation with the men, did you stop action temporarily with reference to the contracting out?
A. Yes, I did.

Cross examination.

By Mr. Lang:

Q. Mr. Rodriguez, how long have you been connected with the United Steelworkers of America?
[fol. 144] A. Since May, 1953.
Q. How many grievances have you filed in that period of time?
A. With Warrior & Gulf Navigation Company?
Q. With all companies?
A. I cannot give you the exact figure.
Q. Would it be in the hundreds?
A. Possibly.
Q. Are you bashful about filing grievances?
A. Me?
Q. Yes, sir.
A. I file them only when they are warranted.
Q. You didn't feel there was any warrant for filing this grievance until August 1958?
A. Well, I can only do what the membership requests me to do. I don't dictate. I serve these people as a representative.
Q. The membership didn't request you to file a grievance until August 22nd, 1958, is that correct?
A. That is correct.
Q. Now, as I understand this proposal, which you say you submitted to the company in the 1956 negotiations, you

didn't ask that the company stop subcontracting. You asked merely that the company agree that it not subcontract unless you gave your permission. Is that correct?

A. Well, the proposal was that we try to protect the interest of our people, to try to limit the contracting out work as much as we can.

Q. My question is: you merely asked that the company agree that it not do any further subcontracting unless it was permitted by the committee?

A. Unless there was mutual agreement.

[fol. 145] Q. What is the difference between that and the company agreeing not to subcontract unless you gave your permission?

A. We try to limit these subcontracts as much as we can, and try to protect the interest of our people.

Q. In other words, your objective was to keep the company from doing any further subcontracting?

A. As much as we could.

Q. You abandoned that proposal, did you not?

A. Yes.

Q. The contract was signed without limitation or any such restriction in it?

A. That is right.

Q. You took it that the company still had the right to keep on subcontracting?

A. No.

Q. Where did the company abandon the right to subcontract?

A. I think, if the Judge will permit, I want to refer you to the management clause and also to the provisions in the grievance procedure. You referred to the second sentence in the first paragraph and said there are certain matters strictly company prerogatives that cannot be arbitrated. You didn't read the rest of it, where it said that any local matter could be arbitrated. In the management clause, you also read that there were certain provisions in there that were the exclusive rights of management, including the right to fire or lay off, due to lack of work, but you failed to finish it by saying there is a proviso that it limits you there, to the extent that you do not use those to discriminate against your employees.

Q. Are you saying that the contract provides that subcontracting is a local matter which may be arbitrated?

[fol. 146] Mr. Black: Objection. He is arguing with the witness.

Mr. Lang: I think it is quite pertinent and not argument.

Judge Thomas: I think the contract speaks for itself. I am the one who is going to have to interpret the contract.

Mr. Lang: Exception.

By Mr. Lang (Continuing):

Q. This question may be out of order, but I would like to ask it. Do you feel that under the provision that local matters should be arbitrated that subcontracting was one of those matters that should be arbitrated?

Mr. Black: Objection.

Judge Thomas: Sustained.

Mr. Lang: Exception.

Mr. Lang: Why were you anxious to obtain a provision in the contract which gave you the right to tell the company when it could subcontract?

[fol. 147] Mr. Black: Objection, as argument.

Judge Thomas: Sustained.

Mr. Lang: Exception.

Mr. Lang: That is all.

Judge Thomas: Is there any further testimony?

Mr. Black: No further testimony.

Judge Thomas: Do you gentlemen want to submit with argument, without argument or what?

Mr. Black: Whatever your pleasure is.

Mr. Lang: I would like to submit without argument.

Judge Thomas: I don't want any brief.

Mr. Lang: Except I would like to say that if, as I understand it, Your Honor is going to rule on the whole matter and not on the preliminary injunction.

[fol. 148] Judge Thomas: That is right. I will take it under submission, gentlemen. I will rule on it just as quickly as I can get to it. I am conscious of the fact that it is an injunction matter, which takes precedence. I will

get to it just as quickly as I possibly can. The Court stands in recess.

Filed Jan. 12, 1959.

IN UNITED STATES DISTRICT COURT

ORDER RESERVING RULING ON DEFENDANT'S MOTION TO DISMISS COMPLAINT AND MOTION FOR PRELIMINARY INJUNCTION —October 30, 1958

This cause comes on to be heard on the Defendant's motion, filed on October 27th, 1958, to dismiss the Plaintiff's complaint and the motion for a preliminary injunction.

Arguments are heard and,

Thereupon the Court reserved its ruling thereon.

Made at Mobile, Alabama, this the 30th day of October A. D., 1958.

Daniel H. Thomas, United States District Judge.

[File endorsement omitted]

[fol. 149]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA

Civil Action No. 2100

UNITED STEELWORKERS OF AMERICA, AFL-CIO, an unincorporated association, Plaintiff,

vs.

WARRIOR & GULF NAVIGATION COMPANY, a corporation, Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER— December 22, 1958

The above entitled cause came on to be heard upon motion for preliminary injunction under Section 301 of the

Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. 185, based upon plaintiff's complaint to compel defendant to arbitrate, under a labor contract, whether defendant has the right to contract out, or subcontract, maintenance work. The plaintiff's motion for preliminary injunction was set down for hearing on October 30, 1958, prior to which defendant filed in opposition to the motion for preliminary injunction, a motion to dismiss, and answer to the complaint. At the hearing on that day counsel for the parties stipulated that all pleadings and matters presented by them be consolidated, tried, and disposed of at one and the same time, and that testimony and other evidence be presented as if on final hearing for a permanent injunction as well as the preliminary injunction. The Court on the same day, after hearing arguments by opposing counsel, and after duly considering same, reserved ruling on defendant's motion to dismiss the complaint and on the plaintiff's motion for preliminary injunction, and denied an oral motion by plaintiff to strike the [fol. 150] Second, Third and Fourth defenses of the defendant's answer. Testimony and exhibits were presented by the parties, with opportunity for cross-examination, after which the matter was on the same day submitted to the Court. The Court, having duly considered the arguments, citations of legal authorities, pleadings and evidence of the parties submitted herein, and being fully advised in the premises and after due and full consideration, now makes the following:

Findings of Fact.

1. The plaintiff, United Steelworkers of America, AFL-CIO, is an unincorporated labor organization within the meaning of Section 2 (paragraph 5) of the National Labor Relations Act, 61 Stat. 137, 29 U.S.C. 152, and Section 301 of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. 185. The plaintiff is engaged in representing employee members in collective bargaining with employers who are employed in the steel industry, including the defendant, Warrior & Gulf Navigation Company, a corporation having its principal place of business at Chickasaw, Alabama, within this District and engaged in transporting

steel products through several Southern states as a contract carrier regulated by the Interstate Commerce Commission. The aforesaid activities of the plaintiff and the defendant affect commerce within the meaning of the statute above cited.

2. The plaintiff and the defendant are parties to a contract covering the maintenance employees, among others, at the Chickasaw terminal, dated September 25, 1956, and effective until midnight September 25, 1959, the pertinent portions of which read as follows:

[fol. 151] Section 10.

Adjustment of Grievances.

Issues which conflict with any Federal statute in its application as established by Court procedure or matters which are strictly a function of management shall not be subject to arbitration under this section.

Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise, there shall be no suspension of work on account of such differences but an earnest effort shall be made to settle such differences immediately in the following manner:

A. For Maintenance Employees:

First, between the aggrieved employees, and the Foreman involved;

Second, between a member or members of the Grievance Committee designated by the Union, and the Foreman and Master Mechanic;

Third, between a member or members of the Grievance Committee and at the option of such committee a representative of the National Organization of the Union, and the Vice President;

Fourth, between the representatives of the National Organization of the Union and the representatives of the Executives of the Company; and,

[fol. 152] Fifth, if agreement has not been reached the matter shall be referred to an impartial umpire for decision. The parties shall meet to decide on an umpire acceptable to both. If no agreement on selection of an umpire is reached, the parties shall jointly petition the United States Conciliation Service for suggestion of a list of umpires from which selection will be made. The decision of the umpire shall be final. The expense and salary incident to the services of the umpire shall be paid jointly by the Company and the Union.

Section 11.

Management.

The management of the Company and the direction of the working forces, including the right to hire, suspend or discharge for proper cause, or transfer, and the right to relieve employees from duty because of lack of work, or for other legitimate reasons, is vested exclusively in the Company, provided that this will not be used for purposes of discrimination against any member of the Union.

3. On August 22, 1958, a number of employees signed a grievance which was presented to the defendant by the plaintiff and which read as follows:

We are hereby protesting the Company's actions, of arbitrarily and unreasonably contracting out work to other concerns, that could and previously has been performed by Company employees.

[fol. 153] This practice becomes unreasonable, unjust and discriminatory in lieu of the fact that at present there are a number of employees that have been laid off for about 1 and ½ years or more for allegedly lack of work.

Confronted with these facts we charge that the Company is in violation of the contract by inducing a partial lockout, of a number of the employees who would otherwise be working were it not for this unfair practice.

4. The plaintiff has not suggested that there is any provision in the labor contract which supports this grievance, and there is in fact no provision in said labor contract on which it may be grounded. Plaintiff contends

that the language in Section 10 of the contract is broad enough to require that this dispute be submitted to arbitration; it asserts that the Court has the duty of determining whether there is any issue to be arbitrated.

5. The defendant was first organized in 1940, and, as an incident to its transportation business, maintains and operates a repair and maintenance yard at its main terminal at Chickasaw, Alabama.

6. The defendant has contracted out construction, repair and maintenance work practically since the inception of its business; it first signed a labor contract with the plaintiff several years prior to the present one.

7. The defendant has contracted out such repair, maintenance and construction work solely for reasons of econ-
[fol. 154] omy and efficiency.

8. Throughout the successive labor agreements between these parties, including the present one, the plaintiff has demonstrated that it was and has been aware of the defendant's practice of contracting out such work, and it has unsuccessfully sought to negotiate changes in the labor contracts, and particularly during the negotiation of the present labor agreement, in the year 1956, which would have limited the right of the defendant to continue the practice of contracting out such work.

9. None of the contracts between the parties affecting the employees involved here has ever contained any provision limiting or abridging in any manner the defendant's right to contract out work of any kind, nor has there been any complaint or grievance at any time prior to August 22, 1958, that any of the labor contracts between the parties in any way limited or abridged the right of the defendant to contract out maintenance or repair work.

10. The Court has read the labor contract carefully and is unable to find in it any provision which could be interpreted to mean that the defendant has surrendered its managerial right to contract out work, or whereby the defendant has agreed to confide in an arbitrator the right to review the defendant's business judgment in contracting out work.

11. On the other hand, the labor contract expressly recognizes the existence of, and reserves to the sole judgment of defendant, matters which are strictly a function of management; and the labor contract expressly prohibits [fol. 155] arbitration of matters which are strictly a function of management. The Court finds that the contracting out of repair and maintenance work, as well as construction work, is strictly a function of management not limited in any respect by the labor agreement involved here.

12. The defendant has five different contracts with labor organizations, three of them with the plaintiff (one at Port Birmingham, Alabama, covering employees of the defendant there; the second, which is the one here involved, covering the employees at the terminal at Chickasaw, Alabama; and the third covering the deck hands and other unlicensed personnel aboard all of defendant's vessels); the other two labor contracts of defendant are with the Marine Engineers Beneficial Association covering the engineroom personnel aboard its vessels, and with the Master, Mates, and Pilots Union covering the wheelhouse employees aboard its vessels.

13. There has been no showing by the plaintiff that the defendant has engaged in or, insofar as these proceedings are concerned, could be adjudged to have engaged in any conduct which has violated any of the provisions of the present labor contract.

Conclusions of Law.

Upon the foregoing findings of fact the Court concludes.

1. The Court has jurisdiction over the parties and the subject matter under Section 301 of the Labor Management [fol. 156] Relations Act of 1947, 61 Stat. 156, 29 U.S.C. 185.

2. The parties are properly before the Court.

3. The issue presented is whether the defendant can be compelled to arbitrate the grievance protesting the contracting out of work.

4. The labor contract does not prohibit, and is not susceptible of being interpreted to require that defendant is prohibited from contracting out work.

5. The labor contract does not give the plaintiff or any of its members or any of the employees of the defendant the right to have arbitrated the question of whether the defendant may contract out work.

6. The right to contract out work is an inherent, traditional right of management which may not be questioned or subjected to arbitration in the absence of agreement on the part of the defendant or an express limitation thereof set forth in the labor contract.

7. The Court has considered the specific contention that Section 10 requires arbitration "should any local trouble of any kind arise," and finds from examination of the remainder of Section 10, of Section 11, of the contract as a whole, the evidence and the arguments of the parties, that this language cannot be interpreted to limit the right of the defendant to contract out work.

8. Defendant may not be required to arbitrate the grievance, and consequently defendant may not be re-
[fol. 157] strained from refusing to arbitrate said grievance since plaintiff has no right to arbitration of the grievance under the labor contract.

ORDER.

An order shall be and it is hereby entered denying the motion for a preliminary and permanent injunction and dismissing the complaint.

It Is, Therefore, Ordered by the Court that this cause be and the same hereby is, Dismissed, with costs taxed against plaintiff.

Made at Mobile, Alabama, this 22nd day of December, A.D., 1958.

Daniel H. Thomas, United States District Judge.

[File endorsement omitted]

[fol. 158]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA

Civil Action No. 2100

UNITED STEELWORKERS OF AMERICA, AFL-CIO, an unincorporated association, Plaintiff,

vs.

WARRIOR & GULF NAVIGATION COMPANY, a corporation, Defendant.

NOTICE OF APPEAL TO FIFTH CIRCUIT COURT OF APPEALS UNDER RULE 73(b)—Filed January 8, 1959

Notice is hereby given that United Steelworkers of America, AFL-CIO, an unincorporated association, plaintiff above-named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Findings, Conclusions and Order entered herein by United States District Judge Daniel H. Thomas on December 22, 1958.

This the 8th day of January, 1959.

Cooper, Mitch, Black & Crawford, Attorneys for United Steelworkers of America, AFL-CIO, By Hugo L. Black, Jr., 1329 Brown-Marx Building, Birmingham 3, Alabama.

[File endorsement omitted]

[fol. 159] Cost Bond on Appeal for $250.00—Filed January 8, 1959 (omitted in printing).

[fol. 164] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 165] MINUTE ENTRY OF ARGUMENT AND SUBMISSION —June 2, 1959 (omitted in printing).

[fol. 166]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 17646

UNITED STEELWORKERS OF AMERICA, AFL-CIO, Appellant,

versus

WARRIOR & GULF NAVIGATION COMPANY, Appellee.

Appeal from the United States District Court for the Southern District of Alabama.

Before Hutcheson, Chief Judge, and Rives and Tuttle, Circuit Judges.

OPINION—July 30, 1959

Tuttle, Circuit Judge: This is an appeal from a denial by the trial court of an order granting specific performance of an agreement to arbitrate. The action was brought by the appellant, United Steelworkers of America, AFL-CIO, against the appellee, Warrior & Gulf Navigation Company, under Section 301 of the Labor Management Relations [fol. 167] Act, 29 U.S.C.A. §185. The sole question presented by the suit is whether, under the terms of the collective bargaining agreement between the parties, unilateral action by the employer in contracting out work that had previously been performed by members of the bargaining unit gave rise to a dispute which is subject to arbitration. The district court held that it did not, and, accordingly, dismissed the Union's complaint.

The employer is engaged in the transportation by barge of steel products and raw materials used in the manufacture of steel. It maintains a terminal at which it performs

certain repair and maintenance work on its barges. During the term of the current collective bargaining agreement the company undertook to contract with others to perform some of this maintenance work. This resulted in the filing of a grievance by the union which averred as follows:

> "Nature of Grievance. We are hereby protesting the Company's actions, of arbitrarily and unreasonably contracting out work to other concerns, that could and previously has been performed by Company employees.
>
> "This practice becomes unreasonable, unjust and discriminatory in view of the fact that at present there are a number of employees that have been laid off for about 1½ years or more for allegedly lack of work.
>
> "Confronted with these facts we charge that the Company is in violation of the contract by inducing a partial lock-out of a number of employees who would [fol. 168] otherwise be working were it not for the unfair practice."

The Company took the position, which it adhered to in the suit below, that the matters dealt with in the grievance were not subject to grievance procedures. These grievance procedures are provided for by Section 10 of the collective bargaining agreement, the first paragraph of which follows:

> "Issues which conflict with any Federal statute in its application as established by Court procedure or matters which are strictly a function of management shall not be subject to arbitration under this section."

This language is immediately followed by a second introductory paragraph upon which the appellant places major reliance. It provides:

> "Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind

arise, there shall be no suspension of work on account of such differences, but an earnest effort shall be made to settle such differences immediately in the following manner: . . ."

In bringing its suit for specific performance of an agreement to arbitrate the appellant must, of course, show that the collective bargaining agreement places on appellee the duty to arbitrate. *Local No. 149* v. *General Electric Co.*, 1 Cir., 250 F. 2d 922, 927. The initial determination whether [fol. 169] such duty arises under the contract must be made by the court. *Local No. 149* v. *General Electric Co., supra; Engineers Association* v. *Sperry Gyroscope Co.*, 2 Cir., 251 F. 2d 133, 137. Since an agreement relating to the processing of grievances, including compulsory arbitration, may appropriately be dealt with by the parties as they see fit, it is of course within the competence of the Union and the employer to limit the subject matter of such grievance procedures. Here the parties introduced the section dealing with grievances by an initial withdrawal from the provisions of the section of any matters "which are strictly a function of management." We have heretofore in *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America* v. *Greyhound Corporation*, 5 Cir., 231 F. 2d 585, stated that whatever subjects are not covered by an employment contract are left to the parties to act upon as they see fit. The contract before us does not deal with the power of the employer to contract with others to perform services previously done by its employees. Since this is a matter as to which an employer may, except as limited by a specific collective bargaining agreement, act without violating either state or federal law, it remains, so far as relates to this agreement, strictly a matter of management. Even if this result did not follow from the fact that the contract does not restrict such action, it would nevertheless follow by reason of the construction of this collective bargaining agreement in the light of the conduct of the parties in negotiating it. [fol. 170] The trial court, upon ample evidence, made the following findings of fact:

"8. Throughout the successive labor agreements between these parties, including the present one, the plaintiff has demonstrated that it was and has been aware of the defendant's practice of contracting out such work, and it has unsuccessfully sought to negotiate changes in the labor contracts, and particularly during the negotiation of the present labor agreement in the year 1956, which would have limited the right of the defendant to continue the practice of contracting out such work.

"9. None of the contracts between the parties affecting the employees involved here has ever contained any provision limiting or abridging in any manner the defendant's right to contract out work of any kind, nor has there been any complaint of grievance at any time prior to August 22, 1958, that any of the labor contracts between the parties in any way limited or abridged the right of the defendant to contract out maintenance or repair work." 168 F.Supp. 702, 704-5 (1958).

Thus, what we have here is a collective bargaining agreement resulting from negotiations between the parties, one of which sought to include a provision prohibiting the company from contracting out some of its work. Having failed at the conference table to obtain the consent of the other party to the inclusion of such provision, it signed the contract that was finally worked out, presumably by a process of "give and take" between the parties. It is not [fol. 171] only consistent with basic principles governing the construction of a contract for the court, as it did, to hold that the final product should not be construed to give the Union the provision it had unsuccessfully sought to have incorporated, but it would be unconscionable for the court to hold to the contrary. Whatever may be meant ordinarily by the term "inherent rights of management," (Cf. *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America* v. *Greyhound Corporation, supra*) we clearly have here a matter which by the agreement of the parties, is "strictly a matter of management."

Having decided that the criticized action of the Company is action which by the agreement of the parties was not to be a subject of arbitration, we conclude that the trial court correctly decided that the action for specific performance must fail. See *Local No. 149* v. *General Electric Co.*, 1 Cir., 250 F. 2d 922; *United Steel Workers of America* v. *American Manufacturing Co.*, 6 Cir., 36 CCH, Lab. Cas. ¶65,300.

The appellant attempts, by characterizing the simple facts of contracting out maintenance work as "unreasonable, unjust and discriminatory," and by asserting such conduct by the Company amounts to "inducing a partial lockout," to set the complaint within a frame of reference comprehended by the agreement to arbitrate. This, however, cannot change the fact that the criticized action, by whatever name called, remains exempted from the range of arbitration. Moreover, it is plain that characterizing this action as "discriminatory" is not sufficient to bring it [fol. 172] within the prohibition of the contract which forbids "discrimination against any member of the Union." This is so because there is no discrimination charged in the grievance except that the contracting out occurred at a time when there "are a number of employees that have laid off for about 1½ years or more allegedly because of lack of work." Nor does the characterization of the Company's action as "a partial lockout" bring it within the language of the section making a "lockout on the part of the Company" a violation of the agreement. Any contention that such action as is here criticized amounts to what is known in labor-management relations as a "lockout" is clearly a simple play on words and is insubstantial.

The judgment is Affirmed.

RIVES, Circuit Judge, dissenting:

Originally of like view with my brothers and the learned district judge, further study and reflection have brought me to the certain conclusion that this judgment should be reversed.

The union's grievance as stated by a group of laboring men need not meet the technically precise requirements

of strict pleadings. As quoted in the majority opinion, it clearly states: first, that the employer has engaged in the practice of subcontracting to such an extent that, under the conditions currently prevailing, the practice amounts to a partial lockout in violation of the express terms of the [fol. 173] collective bargaining contract; and, secondly, that the employer has engaged in this practice for the purpose of discriminating against members of the union, again in violation of the express terms of the contract.[1]

In order to determine the arbitrability of this grievance, reference must be made to Section 10 of the contract, which provides, in pertinent part, as follows:

"Adjustment of Grievances

"Issues which conflict with any Federal statute in its application as established by Court procedure or matters which are strictly a function of management shall not be subject to arbitration under this section.

"Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise, there shall be no suspension of work on account of such differences, but an earnest effort shall be made to settle such differences immediately in the following manner . . ."

Section 10 then proceeds to outline a five-step grievance procedure culminating in arbitration by an impartial umpire selected by the parties.

[fol. 174] The decision in this case ultimately turns upon the interpretation given to the above-quoted provisions of Section 10. The employer, on the one hand, contends: that the first paragraph of Section 10 creates an overriding exclusion from the general arbitration provisions that

[1] In its brief, the union also suggests that the grievance is premised upon the theory that the employer's actions are in violation of the purpose, recognition, wages, and seniority clauses of the contract. Such allegations do not, however, raise a different theory for these clauses are ultimately dependent for their content upon the discrimination and lockout clauses.

follow; that this exclusion is for judicial cognizance rather than merely a direction of the arbitrator; and that the matter of subcontracting falls entirely within this exclusion in that it is "strictly a function of management." The union, on the other hand, joins issue on each of these points, contending: first, that no overriding exclusion from the general arbitration provisions is created; secondly, that, even if such an exclusion were created, the context renders it clear that the exclusion is no more than a direction to the arbitrator; and, finally, that, in any case, the matter of subcontracting without any restrictions is not "strictly a function of management," but, rather, is limited by other provisions of the agreement. I agree with the contention of the union on this third point, and hence do not reach the first two.[2]

Insofar as the union's grievance is premised upon the theory of a partial lockout, the controlling section of the agreement, in my view, is Section 3, which provides:

"Illegal Suspension of Work

"A strike or stoppage of work on the part of the employees represented by the parties signatory hereto [fol. 175] shall be a violation of this Agreement, and there shall be no strikes, work stoppages, interruptions, or impeding of work. Likewise, a lockout on the part of the Company shall also be a violation of this Agreement."

This blanket prohibition of strikes and lockouts is nowhere qualified in the Agreement. On the contrary, the entire tenor of the Agreement is that the parties are seeking complete stability. By Section 3 the employer has unreservedly relinquished any managerial prerogative it might have had to resort to a lockout and, at the same time, it has subordinated any retained management functions to the overiding qualification that they not be exer-

[2] With respect to the questions raised concerning the first paragraph of Section 10, appellant's observation that "this can hardly be said to be a model of contractual draftsmanship" seems well taken.

cised to effect a lockout. Any other construction would render nugatory the express provisions of Section 3.[3]

It therefore seems clear that, if the charges contained in the union's grievance of August 22 are true, the actions of the employer in subcontracting work are in violation of Section 3 of the contract. The essential question then is whether the contract contemplates the determination of these charges by arbitration. When attention is directed to the nature of the issues raised by the charges, it is clear that this question must be answered affirmatively.

In the first place, the contract provides for the arbitration of "differences . . . as to the meaning and appli- [fol. 176] cation of the provisions of this Agreement." Clearly, such differences are involved here. The dispute turns upon the meaning and application of the term "lockout" as it appears in Section 3. Moreover, the contract provides for the arbitration of "any local trouble of any kind." A dispute as to the existence of a partial lockout would seem to be equally well covered by this provision.[4]

The decision of the district court below was premised upon acceptance of the employer's contention that subcontracting is "strictly a function of management" under the terms of the contract, and, therefore, disputes in reference thereto are expressly excluded from the scope of the arbitration provisions by the first paragraph of Section 10 of the Agreement.

Such a premise does not, however, withstand close examination. The management functions clause itself in the contract certainly does not sustain it. That clause provides only that

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[3] It cannot be said of the present arbitration clause as was said in Refinery Employees Union vs. Continental Oil Co., 5th Cir. No. 17344, decided June 24, 1959: "The arbitration clause in the case at bar is not a broad grant of authority to the arbitrators, a *quick pro quo* for giving up the right to strike."

[4] See Timken Roller Bearing Co. v. N.L.R.B., 6th Cir. 1947, 161 F.2d 949, wherein the Court of Appeals for the Sixth Circuit took a similar view of an identical arbitration provision.

"[t]he management of the Company and the direction of the working forces, including the right to hire, suspend or discharge for proper cause, or transfer, and the right to relieve employees from duty because of lack of work, or for other legitimate reasons, is vested exclusively in the Company, provided that this will not be used for purposes of discrimination against any member of the Union."

[fol. 177] The employer has sought to avoid the implications of the absence of any express provision for the retention of the matter of subcontracting as a management function by reliance upon evidence which it contends establishes a practical construction of the contract to that effect, and which is summarized in the district court's findings of fact numbered 8 and 9, quoted in the majority opinion. Though those findings are amply supported by the evidence in the record, they are of no avail to the employer here. This is so because they fall entirely short of justifying the conclusion that unrestricted subcontracting in violation of other provisions of the collective bargaining agreement cannot give rise to an arbitrable grievance.

At the very most, these findings establish only that subcontracting is not, in itself, a violation of the contract and that the practice of subcontracting as it was engaged in by the employer during the earlier years of the relationship between the parties did not involve a breach of any other provisions of the contract. Quite obviously, these propositions do not dispose of the issues of this case. Since the allegation of a partial lockout is based upon *currently prevailing conditions*, the history of the relationship between the parties is in no way inconsistent with the union's present contention.[5] To borrow the words of a

[5] To hold otherwise would be to completely ignore the difference between a contract which limited or absolutely prohibited subcontracting and one which merely subordinated the employer's right to subcontract to the more general obligations imposed upon him by the collective bargaining contract, such as the obligation not to lockout and the obligation not to discriminate. The union's attempt to obtain a contract which would fall into the first of these categories certainly does not constitute an admission that the existing contract did not already fall into the second. Insofar as

[fol. 178] well-known labor arbitrator—"The . . . issue . . . is not whether the Company may contract out *all* of its work or *none* of its work. It is whether there was any implied contractual bar to the contracting out of *this particular . . . work . . . under the circumstances of this particular case.*"[6]

Insofar as the union's grievance is premised upon the theory that the employer has utilized the practice of subcontracting to discriminate against the members of the union, the case is even stronger. Section 11 of the contract *expressly* subordinates all management functions to the overriding limitation that they "not be used for purposes of discrimination against any members of the Union." Thus, "matters which are strictly a function of management," as that term is used in Section 10 of the contract, can never be interpreted to include disputes involving allegations of discrimination. To do so would involve ignoring express limitations in the management functions clause itself.[7]

Finding of Fact No. 11 of the district court (168 F.Supp. 702, 705) is at variance with these views, it is incorrect.

[6] Ralph T. Seward, *Bethlehem Steel Co.*, 30 LA 678. (Emphasis in original.)

[7] The interpretation given here to the term "strictly a function of management" cannot be objected to on the ground that it completely destroys the meaning of that clause. On the contrary, the clause is not without meaning, for it operates to preclude from arbitration any dispute as to the propriety of the exercise of a management function which does not involve a violation of other substantive provisions of the contract. For example, the employer need not arbitrate a dispute concerning his power to discharge for proper cause. If, on the other hand, the dispute involves an allegation that no proper cause for the discharge existed, or that the discharge was motivated by discriminatory purposes, the contract requires reference of the dispute to arbitration.

Similarly, the employer is under no obligation to arbitrate a dispute concerning his power to subcontract. But where, as here, the allegation is that this power has been utilized to violate other provisions of the contract, the duty to arbitrate arises.

Thus, the term "strictly a function of management" is interpreted to mean a function of management, the exercise of which does not involve a violation of any of the other provisions of the contract. Indeed, it is difficult to see how the word "strictly" could have any other meaning.

[fol. 179] In its Findings of Fact, the district court concluded that:

"7. The defendant has contracted out such repair, maintenance and construction work solely for reasons of economy and efficiency.

* * * * * * *

"13. There has been no showing by the plaintiff that the defendant has engaged in or, insofar as these proceedings are concerned, could be adjudged to have engaged in any conduct which has violated any of the provisions of the present labor contract." 168 F.Supp. 702, 704, 705.

Without expressing any opinion as to the correctness of these findings, they are without effect upon the course of this litigation. They involve a determination of the merits of the union's grievance, and, consequently, constitute an invasion of the province of the arbitrator as defined in the contract between the parties.[*]

[fol. 180] I think that the judgment should be reversed, and therefore respectfully dissent.

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[*] We are not here confronted with the necessity of determining whether this Court will adopt the so-called *Cutler-Hammer* doctrine. See *International Association of Machinists v. Cutler-Hammer, Inc.*, 271 App.Div. 917, 67 N.Y.S.2d 317 (Sup.Ct., 1947), aff'd without opinion 297 N.Y. 519, 74 N.E.2d 464 (1947). Under this doctrine, some courts have refused to order arbitration of a dispute otherwise clearly arbitrable on the ground that the plaintiff's grievance was so clearly without merit that no substantial question for arbitration was raised. See, *e.g.*, *United Steelworkers of America v. American Manufacturing Co.*, 43 LRRM 2757 (6th Cir. 1959). But see Judge Magruder's opinion in *New Bedford Defense Products Division v. Local 1113, U.A.W.*, 1st Cir. 1958, 258 F.2d 522, 526-27. Without taking any view on the merits of this doctrine, I would hold that the grievance here sought to be arbitrated is not so lacking in substance as to fall within its ambit. The dispute is therefore arbitrable under the principles enunciated by this Court in *Lodge No. 1, etc. v. Cameron Iron Works*, 1958, 257 F.2d 467, 471.

[fol. 181]

IN UNITED STATES COURT OF APPEALS

No. 17646

UNITED STEELWORKERS OF AMERICA, AFL-CIO,

versus

WARRIOR & GULF NAVIGATION COMPANY.

JUDGMENT—July 30, 1959

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, United Steelworkers of America, AFL-CIO, and the surety on the appeal bond herein, National Surety Corporation, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Rives, Circuit Judge, dissenting."

[fol. 182] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 183]

SUPREME COURT OF THE UNITED STATES

No. 443, October Term, 1959

UNITED STEELWORKERS OF AMERICA, Petitioner,

vs.

WARRIOR & GULF NAVIGATION COMPANY.

ORDER ALLOWING CERTIORARI—December 7, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is set for argument immediately following No. 360.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration or decision of this application.